Submitted May 15, 1911.

75175

FILED.
MAY 15 1911
JAMES H. McKENNEY,
CLERK.

United States Supreme Court,

OCTOBER TERM, 1910.

291.

GEORGE T. SIMPSON, IRA B. MILLS, CHARLES F. STAPLES and CHARLES E. ELMQUIST, *Appellants*,

vs.

DAVID C. SHEPARD, *Appellee*,

292.

GEORGE T. SIMPSON, IRA B. MILLS, CHARLES F. STAPLES and CHARLES E. ELMQUIST, *Appellants*,

vs.

EMMA B. KENNEDY, ROBERT ELIOT TOD, ROBERT W. DE FOREST and WILLIAM STEWART TOD, executrix and executors, respecively, of the will of JOHN S. KENNEDY, deceased, and HENRY F. DIMOCK, *Appellees*,

---

GEORGE T. SIMPSON, IRA B. MILLS, CHARLES F. STAPLES and CHARLES E. ELMQUIST, *Appellants*,

vs.

HENRY A. JAMES, *Appellee*,

293.

GEORGE T. SIMPSON, IRA B. MILLS, CHARLES F. STAPLES and CHARLES E. ELMQUIST, *Appellants*,

vs.

WILLIAM SCHILLARER, *Appellee*.

MOTION TO ADVANCE.

United States Supreme Court.

OCTOBER TERM, 1910.

GEORGE T. SIMPSON, IRA B. MILLS, CHARLES F. STAPLES and CHARLES E. ELMQUIST, *Appellants*,

vs.

DAVID C. SHEPARD, *Appellee*,

GEORGE T. SIMPSON, IRA B. MILLS, CHARLES F. STAPLES and CHARLES E. ELMQUIST, *Appellants*,

vs.

EMMA B. KENNEDY, ROBERT ELIOT TOD, ROBERT W. DE FOREST and WILLIAM STEWART TOD, executrix and executors, respecively, of the will of JOHN S. KENNEDY, deceased, and HENRY F. DIMOCK, *Appellees*,

---

GEORGE T. SIMPSON, IRA B. MILLS, CHARLES F. STAPLES and CHARLES E. ELMQUIST, *Appellants*,

vs.

HENRY A. JAMES, *Appellee*,

GEORGE T. SIMPSON, IRA B. MILLS, CHARLES F. STAPLES and CHARLES E. ELMQUIST, *Appellants*,

vs.

WILLIAM SCHILLABER, *Appellee*.

MOTION TO ADVANCE.

These causes are now in this Court upon the joint appeal of George T. Simpson, the Attorney General, and Ira B. Mills, Charles F. Staples and Charles E. Elmquist, the Railroad and Warehouse Commission, of the State of Minnesota (defendants below), from the decree of the Circuit Court of the United States for the District of Minnesota entered in each of said causes (in favor of complainants) on the 8th day of April, 1911, by the Honorable Walter H. Sanborn. Said causes were tried, submitted and decided together in the Circuit Court. They involve to a large extent the same questions and the appeals therein can be heard in this Court as one case.

SAID APPELLANTS NOW MOVE THE COURT THAT SAID CAUSES BE ADVANCED AND SET DOWN FOR HEARING IN THIS COURT AS ONE CASE AT THE EARLIEST DATE WHICH SUITS THE CONVENIENCE OF THE COURT.

MATTER INVOLVED.

The causes involve:

1. An order of the Railroad and Warehouse Commission of the State of Minnesota dated September 6, 1906, making a reduction throughout the state in intrastate class rates on merchandise, and a supplemental order reducing the in-rates to certain terminals so as to establish the same

relation between them and the new distance rates as the former in-rates to the same terminals bore to the former distance rates.

2. An Act of the Legislature of Minnesota, approved April 4, 1907, reducing maximum intrastate passenger rates from three cents to two cents per mile

3. An Act of the Legislature of Minnesota approved April 18, 1907, reducing maximum commodity intrastate rates on grain and the products thereof, lumber, coal and live stock approximately seven and one-third ($7\frac{1}{3}$) per cent below rates then in force.

4. The determination of the value of the property of the railroads employed in the public service, in the State of Minnesota upon which they are entitled to earn a return.

The Railway Companies put into effect the class rates on merchandise above referred to as required by the orders of the Commission and have maintained them ever since. They also put into effect and have since maintained the passenger rates, prescribed by the Act of April 4, 1907. These suits were commenced before the date fixed for the taking effect of said commodity rates, and an application was thereupon made in each suit in the Circuit Court for a temporary injunction against all of the rates above referred to. The Court denied the applications for injunctions as to the rates which had been put in by the Railroad Companies, but

granted the applications as to the commodity rates which had not been put in. Because of such injunctions, the Railway Companies have not complied with said commodity rate act.

In its findings in these cases the Court determined the value of the property of the several railroads involved, on a basis known as the *cost of reproduction thereof*, and held that each of said companies was entitled to a net income of seven per cent on the value so found. The Court also found that the rates here involved were insufficient to afford an income at that rate on the value found by it, and that the rates, and each of them, were confiscatory. The Court also found that the legislative acts and orders by which said rates were prescribed, and each of them, operate as a burden upon and an interference with, a regulation of and an unjust discrimination against interstate commerce, carried on over the lines of each of the said railways, and that for that reason each of said laws and orders were void.

The several decrees in said causes are in substantially the same form. That part of the decree appealed from in the Northern Pacific case, outside the title and the recital of the appearances, is as follows:

> "After deliberation is is ORDERED, ADJUDGED AND DECREED:
>
> Section 1. That the Acts of the Legislature of the State of Minnesota approved April 4, 1907, and April 18, 1907, respectively, and each of them, and the said Orders of the Railroad

and Warehouse Commission of the State of Minnesota of September 6, 1906, and of May 3, 1907, respectively, and each of them, recited in the Bill of Complaint, operate as a burden upon and an interference with, a regulation of and an unjust discrimination against commerce between the states conducted and carried on over and upon the lines of railway of the Defendant, the Northern Pacific Railway Company, and said Acts and Orders, and each of them, are confiscatory, and constitute an attempt to deprive the complainant and the said Railway Company of his and its property without due process of law and to deny him and it the equal protection of the law, and to impose upon said Railway Company and its officers, agents and employees, unjust, severe and grossly excessive fines and penalties amounting to a denial of the equal protection of the law and therefore said Acts and Orders are, and each of them is, hereby declared to be in violation of the Constitution of the United States and are, and each of them is void and of no effect so far as the said Northern Pacific Railway Company, its officers, directors, agents and employees are concerned, and that said Northern Pacific Railway Company, its officers, directors, agents and employees be and they are, and each of them is, hereby permanently enjoined and restrained from continuing to observe or keep in force the tariffs fixed by the said Orders of September 6, 1906, and May 3, 1907, or the passenger rates set forth and prescribed in said Act of April 4, 1907, or from publishing or adopting the tariffs, rates or charges set forth and prescribed in said Act of April 18, 1907, or from reducing its tariffs, rates and charges to the tariffs, rates and charges set forth in said Act.

Section 2. That said George T. Simpson,

Attorney General of the State of Minnesota, and Ira B. Mills, Charles F. Staples and Charles E. Elmquist, constituting the Railroad and Warehouse Commission of said State, be and they are, and each of them is, hereby permanently enjoined and restrained from any attempt to compel the said Railway Company to continue to observe, publish, post or put in force the rates, tariffs and charges prescribed by the said Orders of September 6, 1906, and May 3, 1907, and that they are, and each of them is, further permanently restrained and enjoined from taking any action, step or proceeding against said Railway Company, or any of its officers, directors, agents or employees to enforce any of its officers, directors, agents or employees to enforce any fines, penalties or punishments for the violation by them of said Orders of September 6, 1906, and May 3, 1907.

Section 3. That said George T. Simpson, the Attorney General aforesaid, be and he is hereby enjoined and restrained from taking or causing to be taken any action, step or proceeding against the said Railway Company, or its officers, directors, agents or employees to enforce the penalties and punishments specified in said Acts of April 4, 1906, and April 18, 1907, or either of them,

Section 4. That said defendants E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph Michaud, and all other shippers of freight over the lines of said Railway Company, and all others making use of said lines of railway, be and they are, and each of them is, hereby permanently enjoined and restrained from instituting or causing to be instituted any action or proceeding for any violation of the said acts or orders, or any of them.

Section 5. That the Complainant recover of

the Defendants George T. Simpson, Attorney General of the State of Minnesota, and Ira B. Mills, Charles F. Staples and Charles E. Elmquist, constituting the Railroad and Warehouse Commission of said State, the costs of the suit to be hereafter taxed.

Section 6. This decree shall take effect and be in force from and after the 1st day of June, 1911."

(By subsequent amendment the date of taking effect of the decree was changed to July 1, 1911).

REASONS FOR THE APPLICATION.

The suit in each case was brought by one or more stockholders, against the railroad company and the state officers. By the decree appealed from the railroad companies are required to cease obedience to the merchandise and passenger rates so prescribed by the state which have been in effect for about three years, and said railroad companies are about to restore the old rates.

The financial interests involved are very large and seriously concern all the railway companies doing business in said state, as well as all the people doing business over their lines.

The principles of law involved are also of the utmost importance, not only to the railroads and the people of the State of Minensota, but to the railroads and the people of the entire country, so far, as they involve the basis for and rate of income upon railroad property and the question of the interference of intrastate rates with interstate commerce. It is clear that there must be uniform rules throughout the country, upon these subjects.

We believe, therefore, that the issues in these cases are of such great public concern as to call for an early final decision.

Respectfully submitted,

EDWARD T. YOUNG,

THOMAS D. O'BRIEN,

Solicitors for Appellants.

CONCURRENCE.

The appellees and the defendant Railway Companies in these causes, while unable to concur in all of the recitals contained in the foregoing application, do concur in the request to advance the causes and in the statements made as to the character and subject matter of the litigation and the importance of the issues involved, both to the parties and the public, and the urgent need for a speedy determination thereof.

JARED HOW,
HALE HOLDEN,
PIERCE BUTLER,
Solicitors for Appellees.

CHARLES W. BUNN,
Solicitor for
Northern Pacific Railway Co.

R. A. JACKSON,
E. C. LINDLEY,
Solicitors for
Great Northern Railway Co.

GEORGE W. SEEVERS,
Solicitor for
Minn. & St. Louis Ry. Co.

SHEPARD v. NORTHERN PAC. RY. CO. et al.

KENNEDY et al. v. GREAT NORTHERN RY. CO. et al.

JAMES v. SAME.

SHILLABER v. MINNEAPOLIS & ST. L. R. CO. et al.

(Circuit Court, D. Minnesota, Third Division. April 8, 1911.)

(Syllabus by the Court.)

1. CONSTITUTION—COMMERCIAL CLAUSE—CARRIERS—STATE RATES VIOLATIVE OF COMMERCIAL CLAUSE.

The acts of the Legislature of Minnesota of April 4, 1907 (Gen. Laws 1907, c. 97 [Rev. Laws Supp. 1909, §§ 2007—1 to 2007—2]), reducing passenger fares within the state about 33⅓ per cent., and of April 18, 1907 (Gen. Laws 1907, c. 232 [Rev. Laws Supp. 1909, §§ 2007—11 to 2007—17]), reducing commodity rates within the state about 7.37 per cent., and the orders of its Railroad and Warehouse Commission of September 6, 1906, reducing general merchandise rates within the state from 20 to 25 per cent., and of May 3, 1907, reducing in rates within the state to distributing points, by their natural and necessary effect substantially burden and directly regulate interstate commerce, create undue and unjust discriminations between localities in Minnesota and those in adjoining states, violate the commercial clause of the Constitution (article 1, § 8), and are void.

2. SAME—RATES CONFISCATORY.

These acts and orders which prescribe maximum fares and rates, that bring from their respective Minnesota intrastate businesses to the Northern Pacific Company an annual net income of only 2.909 per cent., to the Great Northern Company an annual net income of only 3.359 per cent., and to the Minneapolis & St. Louis Company an annual net income of only 2.47 per cent., of the respective values of their Minnesota properties devoted to those businesses, prohibit a fair return upon these values, take the properties of the companies without just compensation, violate the fourteenth amendment to the Constitution, and are void.

3. CONSTITUTION—COMMERCIAL CLAUSE—CARRIERS—RATES—NATIONAL POWER TO REGULATE INTERSTATE COMMERCE EXCLUSIVE AND PARAMOUNT.

The power to regulate commerce among the states was granted by the people to the nation in the Constitution, is exclusive, may be exercised to its utmost extent by the use of all means requisite to its complete exercise, and no state by virtue of its police power, or any other power it possesses, may restrict this grant or the plenary exercise of this power, for these inhere in the supreme law of the land and are paramount to the powers of the states.

4. SAME—RATES IN INTERSTATE COMMERCE NATIONAL AND FREE TO THE EXTENT NOT REGULATED BY THE NATION.

The fares and rates of transportation in interstate commerce are national in character, susceptible of uniform regulation, and so far as the nation has not regulated them are free from regulation by virtue of the commercial clause of the Constitution.

5. CONSTITUTION—COMMERCIAL CLAUSE—CARRIERS—RATES—LIMITS OF NATIONAL AND STATE POWER OF REGULATION.

The nation may regulate interstate fares and rates and all interstate commerce.

To the extent necessary completely and effectually to protect the freedom of, and to regulate, interstate commerce, but no farther, it may by its Congress and its courts affect and regulate intrastate commerce.

To the extent that it does not substantially burden or regulate interstate commerce, a state may regulate intrastate commerce and the fares and rates therein within its borders, but no farther. It may enforce regulations of intrastate commerce and its fares and rates which only inci-

dentally or remotely affect interstate commerce. But state laws, orders, and regulations concerning intrastate commerce, or the fares or rates therein, which substantially burden or regulate interstate commerce, or the fares or rates therein, are beyond the powers of the state, unconstitutional, and void.

And where the attempted exercise of the power of a state to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinges upon or conflicts with the constitutional power of the nation to protect the freedom of, and to regulate, interstate commerce and the fares and rates therein, the latter must prevail, because "that which is not supreme must yield to that which is supreme."

6. CONSTITUTION — COMMERCIAL CLAUSE — CARRIERS — RATES — EFFECT, NOT TERMS, OF STATE REGULATION, TEST OF SUBSTANTIAL BURDEN ON INTERSTATE COMMERCE.

The effect, and neither the terms nor the purpose, of state regulations, determines whether they substantially burden, or only incidentally or remotely affect, interstate commerce.

And this is a judicial question, which each court must decide on its own responsibility on the special facts of the case before it, and in the decision of which it "must obey the Constitution, rather than the lawmaking department of the government."

7. CARRIERS—RATES—DISCRIMINATING DIFFERENCES BETWEEN STATE AND INTERSTATE RATES FORBIDDEN BY INTERSTATE COMMERCE ACT.

The nation has the power to forbid, and by the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), it has prohibited, undue discriminations between localities in different states wrought by unreasonable differences between intrastate and legal interstate rates caused by the reduction of the former by the acts and orders of the officers of a state.

8. CONSTITUTION—COMMERCIAL CLAUSE—MINNESOTA INTRASTATE RATES IMPOSE UNCONSTITUTIONAL BURDENS ON INTERSTATE COMMERCE.

The facts considered, and *held:*

The unavoidable effect of the general and sweeping reductions of intrastate fares and rates in Minnesota, made by the acts and orders considered, was and is substantially to burden, directly to regulate, and to discriminate against the interstate commerce of the defendant companies, and to create undue and unjust discriminations between localities in Minnesota and those in other states, in violation of the commercial clause of the Constitution.

9. CARRIERS—CONFISCATORY RATES—JUST COMPENSATION ENTITLES TO A FAIR RETURN UPON VALUE OF PROPERTY USED.

The just compensation secured by the fourteenth amendment entitles the defendant railroad companies to a fair return upon the reasonable value of their property in Minnesota devoted to the public use of transportation. Such a return is just to the public as well as to the carriers.

10. CARRIERS—CONFISCATORY RATES—VALUE OF RAILROAD PROPERTIES—COST OF REPRODUCTION NEW.

Under the evidence in these cases the cost of reproduction new of the Minnesota properties of the defendant companies devoted to the public use of transportation is more persuasive evidence of their values than the market value of their stocks and bonds, or the original cost of their acquisition and construction.

11. CARRIERS—CONFISCATORY RATES—REASONABLENESS—PRESUMPTION OF CORRECTNESS OF MASTER'S FINDINGS SUPERIOR TO PRESUMPTION OF REASONABLENESS.

Rate making looks to the future, and is a legislative function. Rate judging, determining whether or not rates made are confiscatory, is a judicial function.

There is a presumption in the first instance that Legislatures and commissions make reasonable and just rates, and clear proof is requisite to overcome it.

But when, after fares and rates have been tried by actual use for months, after plenary proof of their effect and other facts determinative

of the issue confiscation vel non, has been made before a master learned in the law, who finds the facts, the legal or judicial presumption that his findings are just and right, while not conclusive, is superior to the original presumption that the rates were just and reasonable.

12. CARRIERS—CONFISCATORY RATES—VALUATION—COST OF REPRODUCTION—INTEREST DURING CONSTRUCTION.

Interest on the cost of reproduction of railroad property at 4 per cent. per annum during one-half the time requisite to acquire and construct it is a necessary expense of reproduction and may be lawfully allowed as such.

13. SAME—APPORTIONMENT OF VALUE—REVENUE BASIS MOST EQUITABLE.

Apportionment on the basis of revenue is the most reasonable and equitable method of assigning the value of railroad property in a state used for transportation to the various classes of its business, in order to determine the reasonableness of fares and rates.

14. CARRIERS—CONFISCATORY RATES—REASONABLENESS—FAIR RETURN IN MINNESOTA 7 PER CENT. PER ANNUM ON VALUE USED.

A net income of 7 per cent. per annum upon the value of railroad property in Minnesota devoted to the public use of transportation is not more than the fair return to which a railroad company is entitled under the fourteenth amendment to the Constitution.

In Equity.

Jared How, Charles W. Bunn, Hale Holden, and Pierce Butler (Robert Thorne and William D. Mitchell, on the briefs), for complainants.

Edward T. Young and Edmund S. Durment (George T. Simpson, on the briefs), for defendants.

SANBORN, Circuit Judge. In the year 1906 the Northern Pacific Railway Company, the Great Northern Railway Company, and the Minneapolis & St. Louis Railroad Company were carrying passengers and freight within, through, and without the state of Minnesota for legal fares, rates, and charges which had been established, filed and published in accordance with the provisions of the act of Congress entitled "An act to regulate commerce," approved February 4, 1887 (24 Stat. 381, c. 104 [U. S. Comp. St. 1901, p. 3157]), and its amendments (U. S. Comp. St. Supp. 1909, pp. 1135, 1138, 1139), and these fares, rates, and charges were equable, relatively fair, and not discriminatory between interstate transportation and transportation within the state of Minnesota.

On September 6, 1906, the Railway and Warehouse Commission of the state of Minnesota by order directed a reduction of the maximum rates for the transportation of general merchandise within that state 20 to 25 per cent. below the fares and rates which these companies were then using, and on May 3, 1907, by a supplemental order it so reduced their in-rates to distributing points in the state that the reductions amounted in the case of the Northern Pacific Company to 13.58 per cent. On April 4, 1907, the Legislature of the state passed an act whereby it reduced maximum passenger fares within that state 33⅓ per cent. below the fares the companies were then using, and on April 18, 1907, it passed an act which reduced maximum commodity rates within the state 7.377 per cent. below the rates thereon in use by the companies. The laws of Minnesota required the companies, their officers and agents, to put these reductions in effect under severe and

unconstitutional penalties. Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932; Gen. Laws Minn. 1907, c. 97 (Rev. Laws Supp. 1909, §§ 2007—1 to 2007—2); Gen. Laws 1907, c. 232 (Rev. Laws Supp. 1909, §§ 2007—11 to 2007—17); Rev. Laws Minn. 1905, § 1987. The companies made and have since maintained the prescribed reductions in the merchandise rates and the passenger fares, but at the suit of their stockholders this court temporarily enjoined them from reducing their commodity rates.

The complainants, stockholders respectively of these railroad companies, brought these suits against them and against the Attorney General and the members of the Railroad and Warehouse Commission of the state to prevent them from maintaining these fares and rates, on the grounds (1) that the orders of the Commission and the acts of the Legislature described substantially burdened and regulated interstate commerce on the railroads of these companies, and (2) that their necessary effect was the confiscation of property of the companies. The cases were referred to Hon. Charles E. Otis as special master to hear and report the evidence, to find the facts, and to recommend forms of decrees. He has made a clear, concise, and exhaustive finding of the facts, has returned all the evidence to the court, and has recommended decrees for the complainants on both of the grounds they presented. Exceptions to his report have been argued, and the cases are here for decrees. In the discussion of the questions at issue the term "defendants" will be used to designate the Attorney General and the members of the Railroad and Warehouse Commission, because they alone actively assail the findings and recommendation of the master.

The first question for consideration is whether or not the orders of the Commission and the acts of the Legislature substantially burden interstate commerce, and the answer to this question must be drawn from an application of the facts which disclose their effect to the established rules of law which govern this subject.

These orders and acts by their terms relate to intrastate fares and rates only. Counsel for the defendants insist that in the police power of the state is vested plenary authority to make and enforce them because they relate to commerce within the state only, while the complainants argue that their enforcement is beyond the power of the state because the effect of their necessary operation is substantially to burden interstate commerce and hence to invade the exclusive domain of the nation, in violati[illegible] the commercial clause of the Constitution (article 1, § 8).

The principles and rules of law by which these orders and acts must be tried have been conclusively established by the decisions of the Supreme Court, and it will not be unprofitable to state them here again and to bear them constantly in mind during the consideration of the facts which must determine the issue here presented.

The power to regulate commerce among the states was carved out of the general sovereign power by the people when the national government was formed, and granted by the Constitution to the Congress of the nation. That grant is exclusive. The United States may exercise that power to its utmost extent, may use all means requisite to its complete exercise, and no state, by virtue of any power it pos-

sesses, either under the name of the police power or under any other name, may lawfully restrict or infringe this grant, or the plenary exercise of this power; for these are paramount to all the powers of the state and inhere in the supreme law of the land. The fares and rates of transportation of passengers and freight in interstate commerce are national in their character and susceptible of regulation by uniform rules. The silence or inaction of Congress relative to such a subject is a conclusive indication that it intends that the interstate commerce therein shall be free, so far as the Congress has not directly regulated it. Welton v. State of Missouri, 91 U. S. 275, 282, 23 L. Ed. 347; Brown v. Houston, 114 U. S. 622, 631, 5 Sup. Ct. 1091, 29 L. Ed. 257; Bowman v. Chicago, etc., Ry. Co., 125 U. S. 465, 485, 507, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Walling v. Michigan, 116 U. S. 446, 455, 456, 6 Sup. Ct. 454, 29 L. Ed. 691; Hall v. De Cuir, 95 U. S. 485, 490, 24 L. Ed. 547; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 570, 573, 7 Sup. Ct. 4, 30 L. Ed. 244.

To the extent necessary completely and effectually to protect the freedom of and to regulate interstate commerce the nation by its Congress and its courts may affect and regulate intrastate commerce, but no farther.

To the extent that it does not substantially burden or regulate interstate commerce a state may regulate the intrastate commerce within its borders, but no farther.

If the plenary power of the nation to protect the freedom of and to regulate interstate commerce and the attempted exercise by a state of its power to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinge or conflict, the former must prevail and the latter must give way, because the Constitution and the acts of Congress passed in pursuance thereof are the supreme law of the land, and "that which is not supreme must yield to that which is supreme." Brown v. Maryland, 12 Wheat. 419, 448, 6 L. Ed. 678; Gibbons v. Ogden, 9 Wheat. 1, 209, 210, 6 L. Ed. 23; Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557, 573, 7 Sup. Ct. 4, 30 L. Ed. 244; Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204, 211, 212, 216, 217, 222, 14 Sup. Ct. 1087, 38 L. Ed. 962; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 327, 328, 26 Sup. Ct. 491, 50 L. Ed. 772; Cleveland, C., C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 517, 519, 521, 20 Sup. Ct. 722, 44 L. Ed. 868; Mississippi Railroad Commission v. Illinois Central R. Co., 203 U. S. 335, 343, 27 Sup. Ct. 90, 51 L. Ed. 209; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 24, 27, 37, 30 Sup. Ct. 190, 54 L. Ed. 355; Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 162, 30 Sup. Ct. 280, 54 L. Ed. 423; Pullman Company v. Kansas, 216 U. S. 56, 65, 30 Sup. Ct. 232, 54 L. Ed. 378; Hall v. De Cuir, 95 U. S. 485, 488–490, 497, 498–513, 24 L. Ed. 547; Bowman v. Chicago, etc., Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Welton v. Missouri, 91 U. S. 275, 280, 23 L. Ed. 347; Crutcher v. Kentucky, 141 U. S. 47, 57, 58, 59, 11 Sup. Ct. 851, 35 L. Ed. 649.

Thus a part of every interstate transportation is carried on within the state of its initiation and concluded within another state, but

neither state may fix or regulate the fares or rates of the part within its borders, because the authority so to do is requisite to the complete preservation of the freedom of, and to the untrammeled regulation of, that transportation, and this power is vested exclusively in the nation. Wabash, etc., R. R. Co. v. Illinois, 118 U. S. 557, 575, 7 Sup. Ct. 4, 30 L. Ed. 244.

The nation and many states provide that carriers may not charge a higher rate for a short haul than for a long haul of like articles in the same direction under similar circumstances. But where the long haul is interstate, although the short haul is entirely within a single state, such a state may not enforce such a law for the same reason. Louisville & Nashville R. Co. v. Eubank, 184 U. S. 27, 42, 43, 22 Sup. Ct. 277, 46 L. Ed. 416.

A state has the general power to prescribe the terms under which foreign corporations may carry on business within it, but any attempted exercise of that power by statute or otherwise in such a way as to prohibit or substantially to burden the interstate commerce of a foreign corporation within its borders is unconstitutional and void. Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 27, 37, 30 Sup. Ct. 190, 54 L. Ed. 355; Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 162, 30 Sup. Ct. 280, 54 L. Ed. 423; Pullman Company v. Kansas, 216 U. S. 56, 65, 30 Sup. Ct. 232, 54 L. Ed. 378; Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 6–11, 12, 13, 84 C. C. A. 167, 172, 177.

Subject to the constitutional limitation, which has been stated, a state may enact and enforce laws prescribing reasonable fares and rates for and otherwise regulating its intrastate commerce, although the operation of such laws remotely or incidentally affects interstate commerce, such as statutes regulating elevator charges (Munn v. Illinois, 94 U. S. 113, 135, 24 L. Ed. 77; Budd v. New York, 143 U. S. 517, 545, 12 Sup. Ct. 468, 36 L. Ed. 247); requiring track connections at a junction (Wisconsin, etc., R. R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194); prohibiting the operation of freight trains on Sunday, regulating the liability of the initial carrier beyond its line (Richmond, etc., R. R. Co. v. Patterson Tobacco Co., 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759); requiring the reasonable stopping of passenger trains at stations (Lake Shore & Michigan South. Ry. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; Gladson v. Minnesota, 166 U. S. 427, 431, 17 Sup. Ct. 627, 41 L. Ed. 1064); requiring telegraph companies to receive messages within a state and transmit them with reasonable diligence (Western Union Telegraph Co. v. James, 162 U. S. 650, 656, 16 Sup. Ct. 934, 40 L. Ed. 1105); excluding diseased cattle by means of a reasonable inspection law (Asbell v. State of Kansas, 209 U. S. 251, 256, 28 Sup. Ct. 485, 52 L. Ed. 778); requiring reasonable connections between trains of different companies (Atlantic Coast Line R. R. Co. v. North Carolina Commission, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933); regulating reasonably the operation of passenger trains (Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472); requiring the transfer of cars to a mill near a crossing (Missouri Pacific Ry. Co. v. Larabee Mills Co., 211 U. S. 612, 620, 622,

29 Sup. Ct. 214, 53 L. Ed. 352); prohibiting the possession of game (New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 40, 41, 29 Sup. Ct. 10, 53 L. Ed. 75); requiring locomotive engineers to be examined and licensed (Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; Nashville, etc., Ry. Co. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352); requiring railway companies to fix their rates annually for the transportation of passengers and freights and to post a printed copy of such rates at their stations (Railroad Company v. Fuller, 17 Wall. 560, 21 L. Ed. 710); forbidding the consolidation of parallel or competing lines of railway (Louisville & Nashville R. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849); regulating the heating of passenger cars and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto (New York, N. H. & H. R. R. Co. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853); providing that no contract made within the state shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers which would have existed if no contract had been made (Chicago, Milwaukee & St. Paul Ry. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688); prescribing rates within the state on a single article, coal (Minneapolis & St. L. R. R. Co. v. Minnesota, 186 U. S. 257, 265, 22 Sup. Ct. 900, 46 L. Ed. 1151; Northern Pacific Ry. Co. v. North Dakota, 216 U. S. 579, 30 Sup. Ct. 423, 54 L. Ed. 624).

On the other hand, the laws of a state or the orders of its commissions relating to its intrastate commerce which by their necessary or natural or probable operation have the effect substantially to burden interstate commerce are beyond its powers, violative of the commercial clause of the Constitution, and void. Of this character are statutes imposing burdensome conditions on the landing of passengers from vessels employed in foreign commerce (Henderson v. Mayor of New York, etc., 92 U. S. 259, 268, 23 L. Ed. 543); requiring carriers engaged in interstate commerce to give all persons upon their public conveyances equal rights and privileges in all parts of those conveyances without discrimination or distinction on account of race or color (Hall v. De Cuir, 95 U. S. 485, 486, 488, 490, 24 L. Ed. 547); requiring telegraph companies to deliver dispatches by messenger to the persons to whom they are addressed so far as such a statute attempts to regulate the delivery of such dispatches at places in other states (Western Union Telegraph Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187); prohibiting a higher rate for a short haul entirely within the state than that charged for a longer interstate haul (Wabash, etc., Ry. Co. v. Illinois, 118 U. S. 557, 573, 7 Sup. Ct. 4, 30 L. Ed. 244); forbidding common carriers to bring intoxicating liquors into a state without a certificate that the consignee is authorized to sell such liquors in the county (Bowman v. Chicago, etc., Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700); prohibiting the sale in a state of fresh meats which have not been taken from animals inspected within the state within 24 hours before they are slaughtered (Minnesota v. Barber, 136 U. S. 313, 322, 329, 10 Sup. Ct. 862, 34 L. Ed. 455); prohibiting the sale of fresh meats from animals slaughtered 100 miles or more from the place at which

they are offered for sale, unless they have been previously inspected by local inspectors (Brimmer v. Rebman, 138 U. S. 78, 81, 11 Sup. Ct. 213, 34 L. Ed. 862); prescribing tolls for the use of a bridge across a river between two states (Covington Bridge Co. v. Kentucky, 154 U. S. 204, 211, 212, 216, 217, 222, 14 Sup. Ct. 1087, 38 L. Ed. 962); requiring a railroad company engaged in interstate commerce to furnish an unreasonable number of cars to shippers in the state upon demand (Houston, etc., Ry. Co. v. Mayes, 201 U. S. 321, 327, 328, 26 Sup. Ct. 491, 50 L. Ed. 772); requiring such a company to stop all its regular trains at county seats on its line (Cleveland, etc., Ry. Co. v. Illinois, 177 U. S. 514, 517, 519, 20 Sup. Ct. 722, 44 L. Ed. 868); requiring such a company to stop its through fast trains at a specified station in the state (Atlantic Coast Line R. R. Co. v. Wharton, 207 U. S. 328, 334, 337, 28 Sup. Ct. 121, 52 L. Ed. 230); levying a tax "equal to 1 per cent. of its gross receipts" on each railroad lying wholly within the state (Galveston, Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031); and requiring foreign corporations to pay large fees as a condition of carrying on business entirely intrastate within a state, although by the orders of the charter board expressly leaving these corporations free to carry on interstate commerce in the state without any condition or restriction (Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 7, 27, 37, 30 Sup. Ct. 190, 54 L. Ed. 355; Pullman Company v. Kansas, 216 U. S. 56, 65, 30 Sup. Ct. 232, 54 L. Ed. 378; Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 162, 163, 30 Sup. Ct. 280, 54 L. Ed. 423).

The acts of the Legislature of Minnesota and the orders of its commission are so general and so far reaching in their effect that there is no doubt that they unavoidably affect the interstate commerce of the companies. In the light of the rules and decisions reviewed, the question here at issue therefore becomes: Do these statutes and orders substantially burden or only incidentally or remotely affect the interstate commerce of the companies? This question, however, may not be answered by the words or terms of the laws and orders, or by a consideration of the intent or purpose of their makers alone. The touchstone to the true answer to the question and the test of the validity of the orders and statutes is their effect upon interstate commerce.

It is the effect, and not the terms or purpose, of state regulations of its local commerce, that determines whether or not they so substantially burden interstate commerce that they violate the commercial clause of the Constitution. And this is a judicial question which each court must determine on its own responsibility on the special facts of each particular case, and in the determination and decision of which it "must obey the Constitution rather than the lawmaking department of the government." Mugler v. Kansas, 123 U. S. 623, 661, 8 Sup. Ct. 273, 31 L. Ed. 205; Henderson v. Mayor of New York, 92 U. S. 259, 268, 23 L. Ed. 543; Minnesota v. Barber, 136 U. S. 313, 319, 330, 10 Sup. Ct. 862, 34 L. Ed. 455; Brimmer v. Rebman, 138 U. S. 78, 81, 11 Sup. Ct. 213, 34 L. Ed. 862; Cleveland, etc., Ry. Co. v. Illinois, 177 U. S. 514, 522, 20 Sup. Ct. 722, 44 L. Ed. 868; Louisville &

Nashville R. R. Co. v. Eubank, 184 U. S. 27, 43, 22 Sup. Ct. 277, 46 L. Ed. 416; Galveston, Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 24, 27, 30, 30 Sup. Ct. 190, 54 L. Ed. 355; Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 162, 30 Sup. Ct. 280, 54 L. Ed. 423.

The counter proposition again presented in this case, that it is only where orders and statutes by their terms or by their construction by state courts substantially or directly regulate interstate commerce, or where by their terms they disclose an intent of their makers so to do that they may be adjudged violative of the commercial clause, has been repeatedly urged upon the consideration of the Supreme Court in the cases just cited, and in many others only to be conclusively denied. In Galveston, Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031, a case which involved a statute levying a tax upon a road entirely within the state which the court held to be a substantial burden upon interstate commerce and void, it said:

"Neither the state courts, nor the Legislatures, by giving the tax a particular name, or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

Only last year in the Kansas cases (216 U. S. 1, 56, 30 Sup. Ct. 190, 54 L. Ed. 355), the Supreme Court again repudiated this contention. In those cases a statute of Kansas required of foreign corporations certain fees as a condition of permitting them to conduct intrastate business in that state. The Western Union Telegraph Company, which was carrying on both intrastate and interstate business in Kansas, applied for permission to continue its intrastate business, and the charter board of the state ordered that its application be granted only on condition that it pay the fee prescribed by the statute, and "that nothing herein contained shall apply to nor be construed as restricting in any wise the transaction by the said applicant of its interstate business, nor its business for the federal government, but that this grant of authority and requirement as to payment relates only to the business transacted wholly within the state of Kansas." The officers of the state insisted that this statute and this order were valid because by their express terms they excluded interstate business, applied to intrastate business alone, and disclosed a clear purpose and intent of the Legislature and the board not to obstruct or embarrass interstate commerce in any way. But the Supreme Court reviewed several of its earlier decisions upon this subject, held the statute and the order unconstitutional, and, among other things, said:

"But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all

such matters the judiciary will not regard mere forms, but will look through forms to the substance of things." 216 U. S. 1, 27, 30 Sup. Ct. 190, 197, 54 L. Ed. 355.

And Mr. Justice White in the Pullman Company's Case, 216 U. S., at page 65, 30 Sup. Ct., at page 236 (54 L. Ed. 378), which involved the same statute, said that one of the propositions conclusively established by previous decisions of the court was that:

"Even though a power exerted by a state, when inherently considered, may not in and of itself abstractly impose a direct burden on interstate commerce, nevertheless such exertion will be a direct burden on such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on."

And Mr. Justice Harlan in Ludwig v. Western Union Telegraph Co., 216 U. S., at page 162, 30 Sup. Ct., at page 285 (54 L. Ed. 423), discussing a similar statute of Arkansas, said:

"According to well-settled rules of statutory construction, the validity of a statute, whatever its language, must be determined by its effect or operation, as manifested by the natural and reasonable meaning of the words employed. Henderson v. Mayor of New York, 92 U. S. 259, 268 [23 L. Ed. 543]. If a statute by its necessary operation really and substantially burdens the interstate business of a foreign corporation seeking to do business in a state, or imposes a tax on its property outside of such state, then it is unconstitutional and void, although the state Legislature may not have intended to enact an invalid statute."

Here, then, is the decisive question upon this branch of these cases. Is the effect of the statutes and orders assailed substantially to burden the interstate commerce of the companies? And we turn to the facts of this case for the answer.

The Northern Pacific Railway Company is a corporation and a common carrier that on June 30, 1906, owned and was operating 7,694 miles of railroad track, of which 1,625 miles are in the state of Minnesota. Its main line extends from Superior, Wis., and Duluth, Minn., which sit side by side at the westerly end of Lake Superior, St. Paul, and Minneapolis, Minn., westerly through North Dakota, Montana, Idaho, Washington, and Oregon, to Seattle, Tacoma, and Portland on the Pacific Coast. From Duluth to other points in Minnesota reached by it the company has an interstate line passing through Wisconsin and a local line that joins the interstate line at Carlton, 20 miles westerly from Duluth. Its main line crosses the western line of Minnesota at Moorhead, Minn., and Fargo, N. D., 250 miles from St. Paul. It has two branch lines, which cross the western line of the state at East Grand Forks, Minn., and Grand Forks, N. D., 320 miles from St. Paul, and at Breckenridge, Minn., and Wahpeton, N. D., 237 miles from St. Paul, respectively.

The Great Northern Railway Company is a corporation and a common carrier that owned and was operating lines of railway comprehending on June 30, 1906, 8,528 miles of track, of which 2,779 miles are in Minnesota. Its main lines extend from Superior, Wis., and Duluth, Minn., in a westerly direction through the states of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon, to the cities of Seattle and Portland. Its line between Duluth, Minn.,

and other points in Minnesota reached by it, passes through the state of Wisconsin. It has five lines of railway which cross the western line of Minnesota and extend westerly into or through other states, one from Minneapolis by way of Willmar, which crosses at Breckenridge, Minn., and Wahpeton, N. D., 214 miles from St. Paul; one from Minneapolis by way of Barnesville, which crosses at Moorhead, Minn., and Fargo, N. D., 241 miles from St. Paul; one from Duluth by way of Crookston, which crosses at East Grand Forks, Minn., and Grand Forks, N. D., 296 miles from Duluth; one which leaves the Willmar main line at Benson and crosses the Minnesota line at Nassau, 173 miles from St. Paul; one which leaves the main line at Willmar and crosses the Minnesota line at Jasper, Minn., 218 miles from St. Paul; and it also has a branch line wholly within the state of Minnesota, which leaves the main line at Barnesville and extends northerly to Noyes, 391 miles from St. Paul.

The Minneapolis & St. Louis Railroad Company is a corporation and a common carrier that owned and operated lines of railroad comprehending on the 30th day of June, 1906, 632 miles of track, and that operated by means of leases or trackage rights 396 miles of track. Its main line extends from St. Paul and Minneapolis, Minn., westerly by way of Winthrop, Minn., to Lebeau, S. D., from St. Paul and Minneapolis, southwesterly by way of Winthrop, Minn., to Storm Lake, Iowa, and from St. Paul and Minneapolis, southerly by way of Albert Lea, Minn., to Des Moines, Iowa.

The whole railroad properties of each of these companies has constituted and still constitutes a single system, and has been and is operated by each of the said companies as such. The cars, engines, and supplies of each company customarily have been and are used upon its system without regard to whether the business in which they have been or are employed has been or is interstate business or business local to a state. Each of said companies customarily has carried and does carry interstate passengers and passengers local to the state on the same train and in the same car, and interstate freight and freight local to a state on the same train, and if less than car load freight in the same car. There has never been any separation, and it is impracticable in the exercise of any fair economy to make and maintain any separation in the business of transporting interstate passengers and passengers local to the state, or between interstate freight and freight local to a state.

By far the larger proportion of the business of each of these companies is interstate, and by far the larger proportion of the business of each of these companies within the state of Minnesota is interstate. In the year 1906 the freight business of the Northern Pacific Company local to Minnesota was 2.67 per cent. of its entire freight business and 12.33 per cent. of its freight business touching the state and its passenger business local to the state was 5.79 per cent. of its entire passenger business and 67.21 per cent. of its passenger business touching the state.

The conditions attending the transportation of passengers and of freight have been and are substantially the same for like distances within those portions of the states of Wisconsin, Minnesota, North

Dakota, and South Dakota reached by the lines of railway operated by either of these companies, whether such transportation has been or is a business local to a state or interstate between any or all of these states.

Prior to the orders and acts here in question the fares and rates in force upon these lines of railway for the transportation of passengers and freight were lawful, for they had been adopted in accordance with the provisions of the act of Congress, were relatively fair, and were not discriminatory between interstate business and business local to any state.

Any substantial change in the basis of rates thus established and in force, or in any particular rate, due only to the fact that the transportation was interstate, or that it was local to a state, would have been actual, undue, and unjust discrimination in fact and any substantial difference in rates for the transportation of passengers, merchandise, or commodities maintained by either of said companies as between traffic local to the state and traffic which goes between the state of Minnesota and either of its neighboring states will constitute actual, undue, and unjust discrimination in fact.

Substantially all commodities and property which are the subject of transportation are classified and arranged in 10 groups with reference to their general character and value, and the cost of transportation thereof and this classification with modifications from time to time made therein has long been used by carriers in the West and Northwest as a basis for fixing rates. Commodities of each class take the same rate under like conditions, and this classification is called the "Western classification." In Minnesota, however, many commodities amounting to several hundred have by the action of the Minnesota Commission been removed from this Western classification, and given special rates, which are called "commodity rates," or have been reduced in class, so that the Western classification in Minnesota is in many respects different from the Western classification in general use. The Commission by its order made on September 6, 1906, prescribed a schedule of maximum rates for the transportation within the state of Minnesota of articles covered by this Western classification as modified by the intervention of the Commission, and required the railway companies to observe these rates. This schedule was such that each rate for each class for any distance bore such an exact relation to each other rate that, given one rate out of the schedule, any other rate could be ascertained by mathematical calculation, and without reference to the schedule itself. This is the plan of the schedule.

For first-class merchandise an allowance of 11.2 cents per cwt. is made for terminal charges, and for each five miles or fraction thereof up to 200 miles .98 of a cent for hauling charge, so that for a distance of five miles the rate is 12 cents per cwt., for a distance of 10 miles the rate is 12.98 cents per cwt., and for a distance of 200 miles the rate is 50.22 cents per cwt. After a distance of 200 miles is reached, .98 of a cent is allowed per cwt. as a hauling charge for each 10 miles or fraction thereof up to 400 miles, so that, the rate for 200 miles being 50.22 cents per cwt., the rate for 210 miles is 51.20 cents, for 220 miles the rate is 52.18 cents, and for 400 miles the rate is 69.82

cents per cwt. After a distance of 400 miles is reached, .98 of a cent is allowed as a hauling charge per cwt. for each 20 miles or fraction thereof up to 500 miles; so that, the rate for 400 miles being 69.82 cents per cwt., the rate for 420 miles is 70.80 cents, and the rate for 500 miles is 74.72 cents per cwt. There are 10 classes of merchandise provided for in this schedule. The rates for classes other than the first class are a fixed per centum of the corresponding rates for the first class, those for the second class being 83⅓ per cent., for the third class being 66⅔ per cent., for the fourth class being 50 per cent., for the fifth class being 40 per cent., for class A being 45 per cent., for class B being 35 per cent., for class C being 30 per cent., for class D being 25 per cent., and for class E being 20 per cent. The rates thus prescribed are maximum terminal rates, and may be increased by 5 per centum for shipments between stations, neither of which is a terminal or a distributing station. The reduction in merchandise rates made by this order of September 6, 1906, was from 20 per cent. to 25 per cent. of the rates theretofore in force. Notwithstanding the extent of this reduction, all the railway companies interested put the rates prescribed by this order into effect on November 15, 1906, and they have ever since been, and still are, maintained by all the companies concerned as maximum rates for the transportation within the state of merchandise covered by the order.

On May 3, 1907, the Commission made an order supplemental to that of September 6, 1906, for the purpose of securing more favorable in-rates to a number of jobbing centers in the state of Minnesota other than St. Paul, Minneapolis, and Duluth. This order had the effect to substantially reduce the previously existing rates to the extent in the case of the Northern Pacific Company of 13.577 per cent. Nevertheless, the railroad companies put in force and have since maintained the rates prescribed by this supplemental order.

The rates prescribed for the articles specified in this Western classification as modified are called "merchandise rates."

By chapter 232 of the Laws of Minnesota 1907, approved April 18, 1907, the Legislature of Minnesota created seven new classes of commodities numbered 11 to 17. Wheat and 13 other articles were placed in class 11, corn and 37 other articles in class 12, lumber and 5 other articles in class 13, sheep in double-decked cars and cattle in class 14, sheep in single-decked cars and hogs in class 15, hard coal in class 16, and soft coal in class 17; and it prescribed and required the companies to observe maximum rates for the transportation of these articles in Minnesota which were on the average 7.37 per cent. below those then lawfully in force, and the rates on grain and coal that were then in force on the Northern Pacific and Great Northern lines had been reduced by those companies in the preceding September and October about 10 per cent. These rates are called "commodity rates" and the companies, in view of the severe penalties denounced for a failure to comply with the act, were about to put them in force when they were enjoined at the suit of the complainants.

By chapter 97 of the Laws of Minnesota 1907, the Legislature prescribed and required the companies to observe maximum rates of 2 cents a mile for passengers over, and 1 cent a mile for passengers

under, 12 years of age for the transportation of such passengers within the state of Minnesota. This law required a reduction of 33⅓ per cent. of the then established lawful rates, and the companies, in view of the severe penalties prescribed for a violation of this law, put these rates in force and have since maintained them.

The average reduction of fares and rates required by these orders and acts were:

(1) On general merchandise 20 per cent. to 25 per cent. by the order of September 6, 1906.

(2) In in-rates to distributing stations amounting in the Northern Pacific case to 13.58 per cent.

(3) In maximum rates on grain, lumber, live stock, coal, etc., 7.-377 per cent.

(4) In maximum rates on passengers 33⅓ per cent.

Superior, Wis., and Duluth, Minn., are situated side by side at the western extremity of Lake Superior. Each is an important business center. Conditions attending transportation to and from either of them are the same as to or from the other. The railroad companies reaching them have always accorded them and do accord them like rates in and out. They ship and receive the same kinds of freight and to and from the same localities. Any substantial difference in the rates accorded them would destroy the commerce of the city given the higher rates. The propriety of a parity of rates to and from these localities has always been recognized.

For the same reasons, each of the couples of cities composed of Grand Forks, N. D., and East Grand Forks, Minn., Fargo, N. D., and Moorhead, Minn., and Wahpeton, N. D., and Breckenbridge, Minn., have always been accorded by the railway companies serving them like rates in and out. The cities in each pair depend upon the same carriers, have substantially the same producing and consuming markets, and receive and ship the same kinds of articles. Any substantial difference in rates as between the cities composing each pair would seriously damage, if not wholly destroy, the commerce of the city given the higher rate, and would be an undue and unjust preference and advantage in fact for its neighboring city.

Failure by the Northern Pacific Company to maintain substantially as low rates between Superior and points in Minnesota as between Duluth and other points in Minnesota would seriously impair the power of the company to transact its interstate business between Superior and points in Minnesota, and would seriously depreciate the value of the company's property in Superior.

Merchandise Rates.

The schedule comprehended within the order of September 6, 1906, prescribed maximum rates for transportation within the state of Minnesota which were from 20 per cent. to 25 per cent. lower than those theretofore established by the Northern Pacific and Great Northern Companies and maintained by them up to the time of the taking effect of the order for transportation in Wisconsin, Minnesota, and North Dakota, regardless of whether such transportation was local to either state or interstate between any two of them. If these companies after

the installation of the rates prescribed by the order for transportation within Minnesota had continued to maintain the former rates for transportation between Minnesota and an adjoining state, the result would have been serious discrimination against localities in the neighboring states.

For example, prior to the taking effect of the order, the rate maintained by the Northern Pacific on a 200-pound barrel of flour (fourth class) from Minneapolis to Fargo was 68 cents. The schedule fixed 54.2 cents as a maximum from Minneapolis to Moorhead. This is a fair example of the difference between the former interstate rates for transportation between Minnesota and an adjoining state and the rates prescribed by the order for transportation within the state.

On the same day that the Northern Pacific Company installed its rates in Minnesota as prescribed by the order, it reduced its interstate rates between Superior and points in Minnesota to an exact parity with its rates between Duluth and other points in Minnesota, its interstate rates between Grand Forks, Fargo, and Wahpeton, N. D., and Minnesota points to an exact parity with its rates between East Grand Forks, Moorhead, and Breckenridge, respectively, and other Minnesota points and its interstate rates between Superior and Grand Forks, Fargo, and Wahpeton, respectively, to an exact parity with its state rates between Duluth and East Grand Forks, Moorhead, and Breckenridge, respectively. The reduction was substantial. For example, the reduction in the rate on first class from Superior to Fargo was from 65 cents per cwt. to 54.1 cents per cwt., and on fifth class from 27 cents per cwt. to 21.7 per cwt.

These reductions were compelled by the necessary and direct effect of the operation of the order. Had they not been made, Superior could not have competed in business in Minnesota with Duluth, Fargo, Grand Forks, and Wahpeton could not have competed with Moorhead, East Grand Forks, and Breckenridge, respectively, nor could Superior have transacted business successfully with Fargo, Grand Forks, or Wahpeton. Moreover, although the Northern Pacific suffered a substantial loss in revenue from its interstate business, it had the choice of submitting to that loss or of suffering substantial destruction of its interstate commerce in articles covered by the order between these localities.

On the same day that the Northern Pacific made these reductions in its interstate rates the Great Northern made similar reductions, although its business between Duluth and Minnesota points is interstate. The reason for its reductions from Duluth was to preserve the relation in rates from Duluth which had always existed between localities on the Great Northern and localities similarly circumstanced on the Northern Pacific, and also to meet the reduced rates on the Northern Pacific line.

Moorhead, Minn., Fargo and Bismark, N. D., Billings and Butte, Mont., are so-called "jobbing centers." Prior to the taking effect of the order of September 6, 1906, they had always been accorded rates by the Northern Pacific Company which would allow them to compete in distribution of merchandise with their nearest neighbors and with St. Paul and Minneapolis and Duluth. The sum of car load rates from St. Paul, Minneapolis, and Duluth to these centers and the less than

car load rates out from these centers to the territory geographically tributary to them, respectively, had been such as to compare favorably with rates in and out of their local competitors as well as with less than car load rates from St. Paul, Minneapolis, and Duluth into the territory geographically served by them, respectively. The order of September 6, 1906, as supplemented by the order of May 3, 1907, substantially reduced car load rates from Duluth, St. Paul, and Minneapolis to Moorhead. This reduction would have given Moorhead a substantial advantage in territory accessible to its jobbing industry, not only as against Fargo unless car load rates to Fargo should have been similarly reduced, but also as against Duluth, St. Paul, and Minneapolis unless less than car load rates from these points to points geographically accessible to Moorhead, which included a considerable territory in North Dakota, should have been proportionately reduced. This reduction, unless accompanied by a corresponding reduction in car load rates to Fargo from the eastern terminals, would have served to build up Moorhead at the expense of Fargo, and therefore to discriminate unduly and unjustly against Fargo as a matter of fact, and would destroy the relation in rates which had theretofore existed between the sum of car load rates into Moorhead and less than car load distributing rates out on the one hand, and less than car load distributing rates from Duluth, St. Paul, and Minneapolis to localities accessible to Moorhead on the other. If Fargo were protected as against Moorhead by a like reduction in car load rates, it would have an advantage and preference over Bismark in territory common to them both and an advantage over the eastern terminals in territory common to Fargo and them, unless car load rates from the eastern terminals to Bismark and less than car load rates from the eastern terminals to the territory accessible to Fargo should be correspondingly reduced; and this advantage would constitute an undue and unjust preference to Fargo as against Bismark, which competes in certain territory with Fargo, unless rates on car load lots from the eastern terminals to Bismark should be correspondingly reduced. And so on, from distributing point to distributing point.

Every rate comprehends two terminal charges, the initial and the final, and a distance haulage charge. It is a cardinal principle of rate making that a rate for a longer distance should be proportionately smaller than one for a shorter distance; that is to say, that a rate for 500 miles should be less than twice the rate for 250 miles, if conditions of transportation be the same, because the rate for 250 miles includes two terminal charges, and, if the rate for 500 miles were twice the rate for 250 miles, it would manifestly include the equivalent of four terminal charges. Even if the haulage charge were the same per mile for a haul of 500 miles as for a haul of 250 miles, which is contrary to the rule generally applied in rate making, the rate per ton per mile for the 500 miles should be less than for the 250 miles because in the one case the terminal charges would be spread over 500 miles and in the other over only 250 miles.

Comparison of rates at present maintained by the Northern Pacific Company from St. Paul to various stations in North Dakota and Montana with those established by the order of September 6, 1906, and now

maintained by the company between St. Paul and Moorhead, discloses that the Commission made rates from St. Paul to Moorhead are in general substantially less than the proportion of the presently maintained interstate rates of the company to these various points in North Dakota and Montana, based on the mileage in Minnesota as compared to that of the entire haul. For example, the present rate maintained by the Northern Pacific on class E, merchandise from St. Paul to Miles City, 743 miles from St. Paul, is 39 cents per cwt. The rate to Moorhead, based on the proportion of 39 cents, which the mileage of the haul in Minnesota is of the entire haul, is 13 cents. The order allows only 11 cents per cwt. from St. Paul to Moorhead, in which, of course, are included two full terminal charges. Maintaining rates comparison of which shows this result involves substantial, undue, and unjust discrimination in fact against the interstate localities. And a reduction of the interstate rates compelled by the reduction of the state rates substantially burdens interstate commerce and restricts its freedom.

After the installation by the Great Northern and the Northern Pacific companies of the rates prescribed by the order of September 6, 1906, it appeared that the sum of the locals from St. Paul to Moorhead and from Moorhead to many points in North Dakota was less than the theretofore established and maintained interstate rates from St. Paul to these points in North Dakota. Both companies thereupon established and now maintain rates from St. Paul to these North Dakota points as a rule no greater than the sum of the locals on Moorhead, but which are substantially lower in general than the interstate rates maintained by them at the time of the taking effect of the order. Maintaining interstate rates from St. Paul to North Dakota localities substantially greater than the sum of the locals based on the state line would have involved undue and unjust discrimination in fact.

As a matter of fact, the reasons for such reduction were to prevent transshipment at Moorhead in order to take advantage of the lower sum of the locals; to retain on its line traffic which was liable to reach Moorhead over other lines by reason of competition; and, as to less than car load lots, to enable jobbers in the Twin Cities and Duluth to compete with Moorhead and Fargo in territory which otherwise the latter would have exclusively occupied by reason of their closer proximity thereto.

It is one of the fundamental dogmas of rate making that the haulage charge per mile shall not increase with increasing distance, if conditions be the same. The order of September 6, 1906, promulgates a schedule which for first-class merchandise, for example, allows a terminal charge of 11.02 cents per cwt. and a haulage charge of .98 cent per 5 miles up to 200 miles, then a haulage charge of .98 cent per 10 miles for added distance up to 400 miles, and then a haulage charge of .98 cent per 20 miles up to 500 miles—the limit of distance covered by the order. Both the terminal charge and the haulage charge allowed for the other merchandise classes are a fixed percentage of those allowed for first. Under this schedule, a hundred pounds of merchandise transported by the Northern Pacific from St. Paul to Moorhead, 248 miles, has been hauled for 48 miles, at the rate of .98 cent per 10 miles when Moorhead is reached. If this same haulage charge of

.98 cent per 10 miles be applied for the remaining distance of the haul from St. Paul to Spokane, Wash., 1,510 miles from St. Paul (which is taken as a fair example merely for the illustration of this principle), it would produce a rate from St. Paul to Spokane on first-class merchandise of $1.79 per cwt. The Interstate Commerce Commission in the Spokane Rate Case has fixed the reasonable rate on first-class merchandise from St. Paul to Spokane of $2.50. Maintaining this rate from St. Paul to Spokane and the Commission's schedule in Minnesota at the same time necessarily involves the raising of the per mile haulage charge after the Minnesota state line has been crossed, or the charging a higher rate within Minnesota for its mileage proportion of long haul interstate business than for business local to the state carried on over the same rails and under the same conditions, and involves necessarily undue and unjust discrimination in fact against localities westerly of the Minnesota-North Dakota boundary line.

For more than 25 years the Northern Pacific Company has maintained an equal basis of rates on merchandise between its eastern terminals and Butte and its western terminals and Butte, and between its eastern terminals and localities intermediate between them and Butte, and between its western terminals and localities intermediate between them and Butte. Other railroads reaching Butte have during the same time maintained like rates to Butte from Sioux City, Omaha, St. Joseph, and Kansas City on the east, and from San Francisco, Sacramento, and Los Angeles on the west. Butte has been as the hub of a wheel, with spokes representing equal rates to these various cities. Industries have been born and have grown in reliance upon this parity of rates. Intermediate points have had rates fixed in proportion with the Butte rates. Competition of markets and of carriers has brought this about. The Northern Pacific Company cannot maintain its present Commission made rates between its eastern terminals and Moorhead, and at the same time its present interstate rates from its eastern terminals to Butte without substantial discrimination in fact against Butte or localities intermediate between its eastern terminals and Butte. If it lowers its rates from its eastern terminals to Butte and intermediate stations to such an extent as to obviate substantial discrimination in fact, it must, to preserve the relation which has always existed, lower to a like extent its rates from its western terminals to Butte and intermediate stations. If, then, the Northern Pacific maintains the Commission made rates between its eastern terminals and Moorhead, it must either substantially discriminate in fact or destroy the general relation of rates which has existed for many years in the territory between the Missouri river and the Pacific Coast. In this way the reduction of the rates in Minnesota either imposes a substantial burden upon, and a regulation of, interstate commerce or compels unjust discrimination therein.

Prior to the taking effect of the order of September 6, 1906, the Great Northern and Northern Pacific Companies had established joint through rates in connection with other carriers from all localities easterly or southerly of the state of Minnesota to all points in Minnesota westerly of St. Paul and Minneapolis reached by them, respectively, and these rates were in force at the time of the taking effect of the

order. After the rates prescribed by the order were installed, the sum of the locals on St. Paul from all localities southerly and easterly of Minnesota to all localities in Minnesota westerly of St. Paul and Minneapolis reached by these companies was substantially less than the then existing interstate rates between such localities southerly or easterly of Minnesota and such Minnesota localities. Maintaining such a relation of rates would have involved undue and unjust discrimination in fact against the localities easterly and southerly of Minnesota and an unjust and undue preference and advantage in fact for St. Paul, because merchandise could have been shipped from all localities easterly and southerly of Minnesota to St. Paul on the theretofore established and then existing interstate rates and distributed from St. Paul to all points westerly of St. Paul and Minneapolis on the rates prescribed by the order for substantially less charges in the aggregate than would have been incurred for the through haul under the then existing through interstate rates. In order to avoid this discrimination, the companies forthwith, after the taking effect of the order, withdrew the then existing interstate rates, and established a new tariff of through rates which were no higher than the sum of the locals on St. Paul. For example, the former through rates from Chicago to Wadena, Minn., on first-class merchandise, was $1.09 per cwt. The sum of the locals on St. Paul after the taking effect of the order was $1.004. The present through rate is $1.004, being a reduction of 8.6 cents per cwt. In other words, the reduction in the Minnesota rates compelled an unjust discrimination in interstate rates, or submission to the imposition of a substantial burden on interstate commerce.

Conditions attending transportation are substantially the same in Minnesota and North Dakota, whether the transportation is local to either state or interstate between them. If unjust and undue preference or advantage in rates is to be avoided, like rates must exist for like distances under like circumstances. The Northern Pacific and Great Northern Companies have prior to the taking effect of the order maintained an equable basis of rates in the territory which these two states compose without regard to state lines. For example, the interstate rates from Moorhead, Minn., westerly into North Dakota, have been the same as from Moorhead easterly into Minnesota, and no conditions have existed, or do exist, which justify a different basis of rates for east-bound to that for west-bound transportation.

Prior to the installation of the rates prescribed by the order, the rate per cwt. of first-class merchandise for 100 miles, for example, out of Moorhead, whether westerly, into North Dakota or easterly, into Minnesota, was 43 cents. For transportation westwardly into North Dakota this rate from Moorhead still exists. The rate prescribed by the order and now in effect from Moorhead eastwardly into Minnesota is per cwt. of first-class merchandise 30.6 cents. This disparity of rates for transportation under substantially similar conditions, and which disparity increases as distance easterly from Moorhead increases, constitutes an undue preference and advantage to the eastwardly localities in Minnesota, and a corresponding prejudice and disadvantage to the interstate westwardly localities in North Dakota. If the companies maintaining this relation of rates, unfair in fact, are to continue

to maintain the rates prescribed by the order, they can remove the existing undue and unjust discrimination in fact against the interstate localities in North Dakota only by reducing the interstate rates from Moorhead to localities in North Dakota to a substantial parity with those maintained from Moorhead to localities at like distance in Minnesota.

The Great Northern Company owns and operates a branch line to Noyes, 391 miles from St. Paul. The line between St. Paul and Noyes is wholly within the state of Minnesota. Conditions attending transportation of merchandise from St. Paul to Noyes are at least no more favorable than those attending transportation from St. Paul to localities in North Dakota on the main line of the company and equally distant from St. Paul. All that is claimed by complainants is that conditions are substantially alike. Prior to the taking effect of the order, the rate per cwt. of first-class merchandise for transportation on the Great Northern from St. Paul to a locality 390 miles distant and situate either in Minnesota or in North Dakota was 96 cents. The Commission made rate from St. Paul to Noyes is 68.8 cents. Such a disparity in rates without substantial dissimilarity in conditions constitutes undue and unjust discrimination in fact.

The order of September 6, 1906, prescribes a basis of rate making. Its schedule is framed to secure a fixed relation between rates on the same class for different distances, a fixed relation between rates for the different classes for the same distance, and therefore manifestly a fixed relation between rates for different classes for different distances. These relations are so stable that, given the rate for any distance on any class, the rate for any other distance on any other class may be determined by one who knows the method upon which the schedule is constructed. An avowed purpose of the schedule is to secure equality of rates.

The Great Northern Company operates a line from St. Paul to Sioux City, Iowa, 327 miles from St. Paul, which leaves the state of Minnesota and enters the state of South Dakota at a distance approximately 218 miles from St. Paul—the distance from St. Paul to Jasper, the border Minnesota town.

It operates another line from St. Paul to Huron, S. D., 294 miles from St. Paul, which leaves the state of Minnesota and enters the state of South Dakota at a distance approximately 173 miles from St. Paul —the distance from St. Paul to Nassau, the border Minnesota town. Between St. Paul and Willmar, Minn., 102 miles from St. Paul, these lines are identical.

Under the schedule prescribed in the order, the progression of the rate—the haulage charge with increasing distance—breaks in two at a distance of 200 miles. That is to say, the haulage charge for first class (and for other classes in fixed relation) having been allowed at .98 cent for each five miles up to 200 miles is cut to .98 cent for each 10 miles beyond 200 miles, and up to 400 miles.

When the line between Minnesota and South Dakota is reached on the St. Paul-Sioux City line, the progression of the rate prescribed by the schedule is .98 cent per 10 miles for first class.

When the line between Minnesota and South Dakota is reached on

the St. Paul-Huron line, the progression of the rate is .98 cent per five miles of haul.

It is apparent that, unless undue and unjust discrimination shall exist in the rates on one of these interstate lines as compared with the other, the same basis of making the rate, the same relation between rates for different distances and different classes must be maintained on one line as on the other, and that, notwithstanding that the 200-mile point of distance on the St. Paul-Huron line is within the state of South Dakota, the progression of the rate should break in two as it has on the St. Paul-Sioux City line on which that point was reached, and that break was made within the state of Minnesota.

The schedule prescribes fixed relations between rates for different distances and different classes. If the relation must be adhered to within the state of Minnesota, it cannot be departed from substantially merely because of the intervention of a state line at one distance or another without involving undue and unjust discrimination in fact in rates.

Since the taking effect of the order of September 6, 1906, both the Great Northern and the Northern Pacific Companies have reduced their interstate rates on merchandise from their eastern terminals in Wisconsin and Minnesota to all localities in general in North Dakota. Such reductions have been made as a rule only to such extent as was necessary to remedy the discrimination resulting from the fact that the sum of the local rates from the eastern terminals to the border towns of Minnesota and from such border towns to the several localities in North Dakota was less than the theretofore established and then existing through interstate rates from the eastern terminals to the several respective localities in North Dakota, and not to such extent as to remedy the discrimination resulting from the fact that in most cases the general basis of rates on merchandise for traffic within Minnesota is substantially lower than that maintained in North Dakota or for traffic crossing the line between North Dakota and Minnesota notwithstanding the substantial equality of conditions. Such substantially lower basis of rates for transportation of merchandise within Minnesota than for that within North Dakota or for that between the two states still exists, and constitutes undue and unjust discrimination in fact.

St. Cloud, Minn., is on the Barnesville main line of the Great Northern, and is 168 miles easterly from Moorhead, at which point this line leaves the state of Minnesota and enters the state of North Dakota. Fergus Falls, Minn., is on the same line, 56 miles easterly from Moorhead. They are each distributing centers, so declared by the Commission's order of May 3, 1907. Whether discrimination, in fact, exists between rates is determined by comparison of the rates involved. If conditions are substantially the same, rates for like distances should be the same, and, if not the same, undue and unjust discrimination in fact will exist. Conditions are substantially alike so far as transportation goes for a distance on the Great Northern of 168 miles westerly of Fergus Falls as for the same distance westerly of St. Cloud. Because they are distributing centers, rates from Fergus Falls to points within that distance westerly should be the same as from St. Cloud

to points of equal distance westerly. Rates on articles covered by the order of September 6, 1906, from St. Cloud westerly within such distance of 168 miles, are substantially lower than those maintained by the Great Northern to points in North Dakota of like distance westerly of Fergus Falls. Such disparity depends only on the fact that in the case of the higher rates the state boundary line is crossed and on no other condition whatsoever; and it constitutes undue and unjust discrimination in fact, not only against the shipper at Fergus Falls, but, as well, against the consumer in the North Dakota towns in question.

Commodity Rates.

The main lines and branches of the Northern Pacific and Great Northern Companies within the states of Minnesota and North Dakota lie wholly (excepting certain limited tracts in which grain cannot be grown, such as the Bad Lands of North Dakota) within grain fields, and grain is shipped in substantial quantities from nearly all stations in these fields to Duluth, Minneapolis, and Superior.

Shipments of coal originate at the head of the Lakes—that is to say, Duluth, Minn., or Superior, Wis.—and find their destination at all localities served by the companies or either of them in Minnesota and eastern North Dakota.

Shipments of lumber originate at Duluth, Cloquet, Little Falls, and other points in Minnesota, and are destined to points throughout Minnesota and North Dakota.

Shipments of live stock originate in Minnesota, North Dakota, and eastern Montana, and go to South St. Paul or Chicago.

Conditions attending transportation are substantially the same as to all these commodities moving eastwardly, whether the shipment originates in Montana, North Dakota, or Minnesota, or whether it finds its termination at one of the Minnesota terminals of the companies, or at Superior, Wis.

Conditions attending transportation are substantially the same as to all these commodities moving westwardly, whether the shipment originates at a Minnesota point or at Superior, Wis., or whether it finds its destination in Minnesota or North Dakota.

Because conditions attending transportation are substantially the same, any difference in the basis of rates charged for transportation of coal, whether the shipment originates at Duluth, Minn., or at Superior, Wis., and is destined to any locality in Minnesota or in eastern North Dakota, or in the basis of rates for transportation of grain, whether the shipment originates in Minnesota or North Dakota or is destined to Minneapolis or Duluth or Superior, or in the basis of rates for transportation of lumber, whether the shipment is destined to a point in Minnesota or to one in North Dakota, or in the basis of rates for the transportation of live stock, whether the shipment originates in Minnesota, North Dakota, or eastern Montana involves an undue and unjust prejudice and disadvantage, in fact, against the localities subject to the higher basis of rates, and an undue and unjust preference and advantage in fact to the localities given the lower basis. Establishing the rates prescribed by chapter 232, Gen. Laws 1907 (Rev.

Laws Supp. 1909, §§ 2007–11 to 2007–17), and maintaining these rates for transportation wholly within Minnesota simultaneously with the maintenance of the interstate rates at present maintained for interstate traffic between Superior and localities in Minnesota, North Dakota, and eastern Montana and between localities in Minnesota and localities in North Dakota and eastern Montana, would involve on the part of the Northern Pacific and Great Northern Companies undue and unjust discrimination in fact against shippers, receivers, and localities transacting the interstate business, and would seriously impair the interstate business of the carriers. If the companies shall be compelled to maintain within Minnesota the rates prescribed by chapter 232, they will be compelled to reduce the basis of their interstate rates between eastern Montana and North Dakota points and Minnesota points and between eastern Montana, North Dakota, and Minnesota points and Superior to a substantial parity with the basis prescribed by chapter 232, in order to avoid undue and unjust prejudice and disadvantage in fact against shippers and localities transacting the interstate business, as well as in order to protect the interstate business of carriers against serious impairment.

Such reduction must be substantial. For example, the present rate on soft coal from Duluth to Wahpeton is $2 per ton. The rate prescribed by chapter 232 from Duluth to Breckenridge is $1.31 per ton. That act provides that a minimum car load of soft coal shall be 30,000 pounds or 15 tons. So that the reduction that will be necessary to avoid discrimination against the interstate locality in the rate on soft coal will be $10.35 per minimum car load.

Duluth, Minnesota, Superior, Ashland, Green Bay, Manitowoc, Sheboygan, and Milwaukee, Wis., Gladstone, Mich., Chicago, Ill., the Peoria, Ill., district, the Springfield, Ill., district, the Streator, Ill., district, and the La Salle, Ill., district, are all competitive points for the distribution of coal into the state of Minnesota.

For many years rates on coal from the various distributing points to localities in southern Minnesota have borne such a relation as to admit of free competition of the various distributing points and of the carriers serving them.

If the rates on coal prescribed by chapter 232, Gen. Laws 1907, shall take effect, the result will be substantial reduction in rates on coal from Duluth to southern Minnesota localities. Such a reduction will deprive all these various distributing points in Wisconsin, Michigan, and Illinois of their power to compete with Duluth in its distribution of coal in Minnesota, unless the carriers serving them shall reduce their interstate rates into Minnesota to a parity with those prescribed by chapter 232 from Duluth. If such carriers shall reduce their interstate rates in Minnesota to a parity with the rates prescribed by chapter 232, the relation which now exists between rates on coal from these various distributing points and localities in northern Iowa and in South Dakota will be destroyed, unless rates shall be similarly reduced from these various distributing centers to localities in these two districts.

Interstate rates on cattle, hogs, sheep, and coarse grain would be affected by the rates prescribed by chapter 232 in the same manner as rates on wheat and coal.

Under the milling in transit privileges, so called, owners of wheat at any point in Minnesota, North Dakota, or South Dakota may pay rates equal to the sum of the rate between the point of shipment to Minneapolis and the proportional rate from Minneapolis to Chicago (for many years and at present the sum of 7.5 cents per cwt.), have it milled at Minneapolis, and within a limited period of time forwarded to Chicago as flour.

In order to allow mills located at other towns in Minnesota to compete with Minneapolis, a like milling in transit privilege has been accorded owners of wheat to ship via such other towns as via Minneapolis, and mills have been established in many such towns under a guaranty that rates into the towns in which such mills are located on wheat in and flour out to Chicago should not exceed the rates from the same points to Chicago via Minneapolis with the milling in transit privilege. Chapter 232, Gen. Laws 1907, substantially reduces rates on wheat within Minnesota. The result will be, if that law takes effect, that the milling in transit rate from points in Minnesota via Minneapolis to Chicago will be automatically reduced substantially. Unless, then, all interstate rates between Minnesota points and Chicago via some interior mill town and with a milling in transit privilege shall be reduced to a substantial parity with the reduced milling in transit rate to Chicago via Minneapolis, Minneapolis will have a substantial advantage in its interstate rates on wheat over the various mill towns in the interior of the state, and wheat in general will as a result of this advantage go to Minneapolis.

Passenger Rates.

Prior to the taking effect of chapter 97, Gen. Laws 1907 (Rev. Laws Supp. 1909, §§ 2007—1 to 2007—2), the general basis of rates for the transportation of passengers between any two points on the Northern Pacific system had been for some years 3 cents per mile for passengers of 12 years of age and over, and 1½ cents per mile for passengers under 12 years of age.

Chapter 97, Gen. Laws 1907, prescribes as a maximum for transportation of passengers wholly within the state of Minnesota 2 cents per mile for passengers of 12 years of age or over and 1 cent per mile for passengers under 12 years of age.

After the maximum rates prescribed by chapter 97 were installed, the sum of the locals between Moorhead and other Minnesota points and Moorhead and points westerly thereof was less than the then existing interstate rates between Minnesota points and points westerly thereof.

The result of this disparity between the through interstate rate over Moorhead and the sum of the locals over Moorhead was this: In the first month after the taking effect of chapter 97, the revenue for passenger business on the Northern Pacific between Moorhead and other Minnesota points increased 647 per cent. over that for the corresponding month of the preceding year, while, eliminating Moorhead business, the revenue for passenger business within the state decreased 2 per cent. In June, 1907, the second month after the tak-

ing effect of chapter 97, there were sold by the Northern Pacific Company 4,037 tickets between St. Paul or Minneapolis, on the one hand, and Moorhead or East Grand Forks, on the other, as compared with only 172 such tickets in the corresponding month of the year before; and in June, 1907, there were sold only 173 tickets between St. Paul or Minneapolis, on the one hand, and Grand Forks and Fargo, on the other, as compared with 984 such tickets in the corresponding month of the year before. In May and June, 1906, only one cash fare was collected on a train between Moorhead and St. Paul or Minneapolis. In those months in 1907 there were 1,168 full cash fares and 82 cash half fares so collected.

Thus the necessary, immediate, direct effect of the operation of chapter 97 was to deprive the Northern Pacific Company of a substantial amount of its interstate passenger business through Moorhead.

Notwithstanding the facility with which interstate passengers could avoid the discrimination against them by making two contracts with the company, one of which should cover the mileage in Minnesota, discrimination in fact against the interstate passenger through Moorhead on the Northern Pacific still existed, and was practiced. It existed against a passenger who, applying for a through ticket, did not know that the sum of the locals on Moorhead was less than the through rate, against the passenger with a trunk which he could not check through unless on a through ticket, and against a passenger who was compelled to use a sleeping car.

As soon as it reasonably could do so, the Northern Pacific remedied this discrimination by reducing all its interstate fares for passenger transportation through Moorhead to an amount no greater than the sum of the locals over Moorhead. Meantime and before tariffs establishing the new reduced interstate rates over Moorhead had been filed, the state of Wisconsin had enacted a two cents per mile passenger fare law, and the state of North Dakota a two and one-half cents per mile law. The rates, therefore, newly established by the Northern Pacific Company between St. Paul, for example, and points in North Dakota and beyond, were in general less than the theretofore existing rates by approximately one cent per mile for the mileage of the transportation in Minnesota and one-half cent per mile for the mileage in North Dakota. And the rates newly established by the Northern Pacific jointly with other companies for passenger transportation between points easterly of Minnesota and points on the line of the Northern Pacific were in general less than the theretofore existing rates by approximately one cent per mile for the mileage of the transportation in Wisconsin and Minnesota and one-half cent per mile for the mileage in North Dakota.

These reductions in rates were compelled by the necessary, immediate, and direct effect of the operation of the laws of the respective states above recited, not only in order that undue and unjust discrimination in rates might be avoided, but, as well, in order that the companies might transact interstate passenger business freely and without impairment of volume.

Prior to the taking effect of the respective orders complained of and of the two-cents maximum passenger fare law, the tariffs of the Great Northern and Northern Pacific Companies for the transportation of passengers or merchandise in Wisconsin, Minnesota, North Dakota, and South Dakota were fair as between the different states, and the local tariffs in each state were fair as compared with the interstate tariffs between such states or any two thereof; and the tariffs now maintained by the companies and each of them for the transportation of commodities covered by chapter 232 are fair as between these states, and the local tariffs in each state are fair as compared with the interstate tariffs between such states or any two thereof.

The installation of the rates prescribed by the respective orders destroyed that fairness as to merchandise rates, the installation of the two-cents passenger rate destroyed it as to passenger rates, and the installation of the rates prescribed by chapter 232 would destroy it as to rates on commodities covered by it.

It is wholly impossible for carriers situated as are the Great Northern, Northern Pacific, and Minneapolis & St. Louis Companies to maintain materially lower rates or a materially lower basis of rates or a different classification of subjects of transportation, or a different relation between rates for different classes of merchandise, for traffic wholly within Minnesota, than for that between Minnesota and any of its neighboring states without unjust and undue discrimination in fact against the localities in the neighboring states, and without serious impairment of the volume of the interstate business of the carriers. Such lower basis of rates within Minnesota than between Minnesota and its neighboring states would result in the promotion of the growth and prosperity of localities in Minnesota at the expense of localities in neighboring states and the enhancement of the value of property in Minnesota, and the serious impairment of the value of the property of all business men, as well as of that of the carriers themselves in the neighboring states.

Duluth and Superior, Grand Forks and East Grand Forks, Fargo and Moorhead, and Wahpeton and Breckenridge are so situated that each pair must be considered for the purpose of rate making as one locality. Both as a practical matter of the operation of a railroad and in order that undue and unjust discrimination as between the members of any pair may be avoided, each city of each pair must have rates equal to those accorded to the other city. If different rates, a different classification, or a different basis of rates be lawfully prescribed by one regulating power in or out of one city of any pair to those prescribed by another regulating power in or out of the other city of the pair, the carriers serving them both must, in order to avoid undue and unjust discrimination in fact as between them as well as to preserve their own power to transact business with each of them, adopt for each city the lower rates or basis of rates, or classification prescribed for either city.

If it should be necessary for the companies involved, in order that discrimination may be avoided, or in order that the companies may preserve the volume of their respective businesses in interstate trans-

portation free from impairment in volume, to install for their interstate business a basis of rates no higher than these respectively prescribed in the acts and orders complained of, and to extend the rates for their interstate long-haul business upon the principle provided in said acts and orders, the result will be a substantial diminution in the revenues of the companies from their interstate business. For example, the diminution in the revenue of the Northern Pacific Company for the year ending June 30, 1906, the last fiscal year prior to the taking effect of the order of September 6, 1906, from its interstate business in transportation of commodities covered by chapter 232 alone, if the basis prescribed by chapter 232 had been applied to its rates for such interstate business, would have been $4,193,283.04; and the loss in such interstate revenue for such year for transportation of merchandise covered by the order of September 6, 1906, if the basis prescribed by the order had been applied to its rates for such interstate business, would have been $4,119,761.96. The loss in its interstate business from passenger transportation, if the two-cents maximum rate had been applied during such year, would have been $1,444,955.35, or a total loss, on account of the acts and orders complained of, of $9,758,000.35.

If, in order to prevent discrimination as between different states, it shall be necessary for the companies involved to apply for local business within the respective states, the same basis of rates as those prescribed for business local to Minnesota by the acts and orders respectively complained of, the loss in revenue to the companies involved will be substantial. For example, in the year 1906 the loss in revenue of the Northern Pacific Company, if the basis prescribed by chapter 232 had been applied to its local business in transportation of commodities covered thereby in other states, would have been $198,540.51; and its loss in revenue, if the basis of rates prescribed in the order of September 6, 1906, had been applied to its local business in other states for transportation of merchandise covered thereby, would have been $952,644.83, or a total loss on freight of $1,151,185.34; and, if the two-cents maximum passenger rate had been applied to its local business in other states, the loss in revenue would have been $990,908.82, or a total loss, under the acts and orders complained of, of $2,142,094.16.

The facts which have been recited were found by the master, and the foregoing statement of them is, with rare exceptions, in his clear and concise language. Many exceptions are leveled at these findings, but they are sustained by clear and convincing evidence, and the only question remaining here is: Do they justify the conclusion that the effect of the acts and orders prescribing the Minnesota maximum fares and rates is to impose a substantial burden upon or to regulate or to discriminate against interstate commerce, or to create unjust discrimination between interstate localities? Counsel for the defendants insist that this question should be answered in the negative.

They argue that the prescription and enforcement of these fares and rates cannot constitute an unconstitutional burden upon or interference with interstate commerce because the orders and acts relate to commerce within the state only and the state has power to regu-

late its purely local commerce. This contention, however, cannot be sustained because, as has been demonstrated in the earlier part of this opinion, if, by their natural or necessary operation, these acts and orders have the effect substantially to burden interstate commerce, they fall under the ban of the Constitution and beyond the power of the state whatever their terms or the intent of their makers may have been.

They say that, while the reduction of the local fares and rates may induce the companies to reduce their interstate rates and fares across the borders of the state to a parity with the local rates, this is the voluntary act of the companies not directly required by the laws and orders. There are, however, known and inexorable laws of commerce, and one of them is that transported articles will move at the lowest available rates. Reduce local fares and rates so that fares and rates in interstate commerce across the borders of the state are substantially higher than the sums of the locals over the Minnesota stations on or near the state boundaries and the companies must reduce their interstate fares and rates on that portion of their interstate commerce affected by the sums of the locals over the Minnesota borders to a substantial parity with the sums of the locals or their interstate commerce affected thereby will unavoidably become intrastate commerce and move at the sums of the locals. There is nothing voluntary on the part of the companies in the loss or burden imposed upon them by these reductions. That they must suffer whether they reduce their interstate rates or maintain them and permit the transformation of their affected interstate commerce into intrastate commerce by rebilling and local contracts so that it can pass at the sums of the locals. The loss of the difference in revenue between that derived from their former interstate rates and that derived from the sums of the locals is a direct and unavoidable burden upon their interstate commerce imposed by the acts and orders stated which the companies may not by any device avoid.

Moreover, the acts and orders making these intrastate reductions necessarily operate to discriminate against interstate commerce and the right of the companies to carry it on, and in that way constitute a direct burden upon such commerce. Mr. Justice White said in the Pullman Company's Case, 216 U. S. at page 65, 30 Sup. Ct. at page 236 (54 L. Ed. 378), that, though a power exerted by a state may not abstractly impose a direct burden on interstate commerce, yet such exertion will be a direct burden upon such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on. If the companies exercised their right to maintain and did maintain their former interstate rates upon that portion of their interstate commerce affected by the local Minnesota rates, they lost to local commerce that interstate commerce, because it passed by rebilling and local contracts at the sums of the locals. This necessary effect of the local maximum rates was a direct discrimination against interstate commerce and the right to conduct it, and hence a direct burden upon that commerce. If, on the other hand, to avoid this discrimination the companies reduced their rates, that reduction was a like direct burden,

and no course was open to them whereby they could exercise their constitutional right to conduct their interstate commerce free from the direct regulation thereof effected by these acts and orders.

Another vicious and inevitable effect of these acts and orders is the unjust discrimination in fares and rates between localities in Minnesota and those beyond its borders which they effect. Moorhead, Minn., and Fargo, N. D., are practically the same distance from St. Paul, Minneapolis, and Duluth, respectively. They have long received, and they ought to continue to receive, the same fares and rates in and out. This is also true of Duluth, Minn., and Superior, Wis.; Breckenridge, Minn., and Wahpeton, N. D.; East Grand Forks, Minn., and Grand Forks, N. D. These acts and orders reduced the fares to and from the Minnesota towns of these pairs from and to other Minnesota points 33⅓ per cent., and the freight rates from 7 per cent. to 25 per cent., while the former interstate fares and rates from and to the other towns of the pairs remained in effect, as to commodity rates under the protection of the injunction of this court, and would have continued in effect in the matter of merchandise rates and the passenger fares had not the prohibition of discriminations between localities by the interstate commerce law and the laws of trade which have been considered compelled the companies to reduce their interstate rates to a parity with the local rates prescribed. The discrimination thus wrought by these acts and orders between the towns mentioned on the state lines is but illustrative of the undue preference and advantage the local reductions gave to Minnesota cities and towns, and the unreasonable prejudice and disadvantage to which they subjected the towns and the cities of other states similarly situated in their vicinity.

Congress by the "act to regulate commerce" (24 Stat. 379) forbade the companies to make or give any undue or unreasonable preference or advantage to any party or locality, or to subject any party or locality to any unreasonable prejudice or disadvantage in any respect whatsoever, and the prevention of the discrimination thus prohibited was one of the main purposes of this legislation. The first section of the act, however, contained this provision:

"Provided, however, that the provisions of this act shall not apply to transportation of passengers or property, or to the receiving, storage or handling of property wholly within one state, and not shipped to or from a foreign country from or to any state or territory aforesaid."

The result was that the act of Congress forbade, and the acts and orders of the officers of Minnesota compelled, this discrimination between localities under the penalty of the surrender by the companies of a substantial part of their interstate commerce or of the revenue therefrom. Counsel for the defendants argue, however, that this radical discrimination is not forbidden by the interstate commerce law because it is a discrimination wrought, not by an undue difference between intrastate rates of which they say the state has exclusive jurisdiction, nor by an undue difference between interstate rates of which they admit the nation has exclusive jurisdiction, but by an undue difference between intrastate rates and interstate rates, and they contend that over the discrimination thus wrought neither state nor

nation has any power. The argument, however, again disregards the broad and fundamental difference between the power of the state over intrastate commerce and the power of the nation over interstate commerce. The state may regulate its intrastate commerce so far only as the exercise of its power does not substantially burden or regulate or discriminate against interstate commerce, but no farther. A state may not prohibit or regulate discrimination between interstate and intrastate rates in such a way as substantially to burden or regulate interstate commerce, as, for instance, by the prohibition of a higher charge or rate for a short haul wholly within the state than for a long haul that includes the short haul and extends into another state, because such action burdens and regulates interstate commerce. Louisville & Nashville R. R. Co. v. Eubank, 184 U. S. 27, 42, 43, 22 Sup. Ct. 277, 46 L. Ed. 416. By the same mark, because it is a direct regulation of interstate commerce, the nation may regulate and prohibit discriminations wrought by an undue difference between interstate and intrastate rates, although such regulation or prohibition may also to some extent affect and regulate intrastate commerce. For to the extent necessary completely and effectually to regulate interstate commerce the nation by the Congress and its courts may affect and regulate intrastate commerce. United States v. Colorado & N. W. R. Co., 157 Fed. 321, 331, 85 C. C. A. 27, 37, 15 L. R. A. (N. S.) 167; Brown v. Maryland, 12 Wheat. 419, 448; Gibbons v. Ogden, 9 Wheat. 1, 209, 210, 6 L. Ed. 23; Gulf, Colorado, etc., Ry. Co. v. Hefley, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910; Interstate Commerce Commission v. Detroit, etc., Ry. Co., 167 U. S. 633, 642, 17 Sup. Ct. 986, 42 L. Ed. 306; State Freight Tax Case, 15 Wall. 232, 275, 280, 21 L. Ed. 146; Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 8, 24 L. Ed. 708; Chy Lung v. Freeman, 92 U. S. 275, 280, 23 L. Ed. 550; Railway Co. v. Husen, 95 U. S. 465, 471, 472, 473, 24 L. Ed. 527; Hall v. De Cuir, 95 U. S. 485, 488–490, 497, 498–513, 24 L. Ed. 547; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 736, 737, 5 Sup. Ct. 739, 28 L. Ed. 1137; Bowman v. Chicago, etc., Ry. Co., 125 U. S. 465, 479, 480, 481, 484, 485, 488, 489, 490, 491, 507, 508, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Welton v. Missouri, 91 U. S. 275, 280, 23 L. Ed. 347; Lyng v. Michigan, 135 U. S. 161, 166, 10 Sup. Ct. 725, 34 L. Ed. 150; Norfolk, etc., Ry. Co. v. Pennsylvania, 136 U. S. 114, 115, 118, 120, 10 Sup. Ct. 958, 34 L. Ed. 394; Crutcher v. Kentucky, 141 U. S. 47, 57, 58, 59, 11 Sup. Ct. 851, 35 L. Ed. 649; Osborne v. Florida, 164 U. S. 650, 655, 17 Sup. Ct. 214, 41 L. Ed. 586; Caldwell v. North Carolina, 187 U. S. 622, 623, 23 Sup. Ct. 229, 47 L. Ed. 336. "This power," said Chief Justice Marshall, "like all others vested in Congress, is complete in itself, may be exercised *to its utmost extent*, and acknowledges no limitations, other than are prescribed in the Constitution. * * * If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, *is vested in Congress as absolutely as it would be in a single government*, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Gibbons v. Ogden, 9 Wheat. 1, 189, 194, 197, 6 L. Ed. 23; Lottery Case, 188 U. S. 321, 346, 347, 359, 23 Sup. Ct. 321, 47 L. Ed. 492. The power therefore to prohibit the railroad companies from making or permitting any undue discrimination between localities and parties by unreasonable differences between intrastate and interstate rates was vested in Congress, and no acts or orders of the state or its officers could justify such a discrimination. If, as the Supreme Court held in the Eubank Case, a state has no authority to suppress such a discrimination, much less has it the power to create and maintain it.

But counsel insist that, if Congress had the power to forbid this discrimination, it did not exercise it because it declared in the proviso to section 1 that the provisions of the interstate commerce act should not apply to transportation wholly within one state. But the main object of the act was to prevent every undue discrimination between parties and between localities. When it was enacted there was a crying evil in such discriminations, an insistent public demand for the remedy thereof, and a determined effort by the legislators to make the prohibitions of such discriminations as broad, searching, and effective as the Congress had the power to make them. It had, as we have seen, ample authority to forbid discriminations wrought by differences between intrastate and interstate rates, but none to prohibit discriminations caused by differences in rates for transportations wholly within a state. The act prohibits any undue discrimination in any respect whatever between localities under similar circumstances and conditions by any common carrier subject to its provisions. In the light of these facts, the natural and reasonable construction of the proviso in section 1 is that it was inserted out of abundance of caution to make sure that the broad terms of the act did not go beyond the constitutional power of the Congress and directly regulate intrastate commerce more than was necessary completely to regulate interstate commerce, and that it has no farther effect upon the subject of discrimination now under discussion. The evil the act was passed to remedy, the main purposes of its passage, the public demand for a prevention of all discriminations, the patent effort of the legislators to meet this demand, and the broad terms of the prohibitions themselves compel the conclusion that the Congress intended to exercise, and that by this act it did exercise, its constitutional power to prevent discriminations of the character here in question to its utmost extent, and that the companies were and are prohibited thereby from making or maintaining the unjust discriminations between localities which the maintenance of their former lawful interstate fares and rates and the intrastate rates prescribed by the acts and orders of the officers of the state would necessarily effect. Reliance Textile & Dye Works v. Southern Ry. Co., 13 Interst. Com. R. 48, 54.

The next suggestion is that, if the prohibition of the interstate commerce act applies to discriminations between intrastate and interstate rates, it applies only when the transportation is under substantially similar circumstances and conditions and the acts and orders in question render the circumstances and conditions under which the intrastate rates are charged dissimilar from those which condition the interstate rates. But state laws and orders effecting discrimina-

tions forbidden by acts of Congress cannot be held by themselves to create such dissimilar conditions as to warrant the maintenance of such discriminations.

Finally, counsel cite, to overcome the proof of the substantial burden and the direct regulation of interstate commerce effected by the acts and orders in this case, with which this record teems, these words from the opinion of Mr. Justice Brewer in Ames v. Union Pacific Ry. Co. (C. C.) 64 Fed. 172:

"Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true that the companies may, for their own convenience, to secure business, or for any other reason, rearrange their interstate rates, and make them conform to the local rates prescribed by the statute; but surely there is no legal compulsion. The statute of the state does not work a change in interstate rates, any more than an act of Congress prescribing interstate rates would legally work a change in local rates. Railroads cannot plead their own convenience, or the effect of competition between themselves and other companies, in restraint of the otherwise undeniable power of the state."

The reduction of local rates does not interfere with interstate rates "as a matter of law," yet it may do so as a matter of fact. Whether or not the general and sweeping reductions in local rates in Minnesota necessarily interfere with interstate rates and interstate commerce is in this case, as it must be in every case, a question of fact. The facts which determine that question in this case have been set forth in this opinion at great length, because it is upon them, and not upon legal inferences, that the answer to the question, whether or not the effect of the necessary operation of the acts and orders challenged is substantially to burden interstate commerce, now rests. Those facts are that it was not for "their own convenience," but at great inconvenience and loss, not on account of the "effect of competition between themselves and other companies," but because these acts and orders, the prohibition of discrimination between localities by the interstate commerce act and the laws of trade, forced them to do so, that the defendants reduced their interstate commerce rates to a parity with the local rates and submitted to the loss of interstate revenue this action entailed. The opinion of Mr. Justice Brewer in the Ames Case is inapplicable to the cases in hand because no such array of condemnatory facts was ever submitted to him in that case, and it is perhaps not too much to say that no case has been found in the books in which any such proof of the unavoidable effect of general reductions of intrastate rates to substantially burden and directly regulate interstate commerce has ever been presented.

Minnesota, North Dakota, South Dakota, and Wisconsin embrace a vast region 1,000 miles in extent, traversed by the railroads of the defendant companies, which produces the same things shipped to the same markets and consumes the same things bought in the same markets. The conditions of the transportation of passengers and freight in interstate traffic and also in intrastate traffic have been and are identical, and a relative, fair, and equable relation between fares and rates in interstate commerce and fares and rates in intrastate commerce had been maintained before the acts and orders here challenged were made. The railroad companies had established and were collect-

ing their interstate fares and rates pursuant to the act to regulate commerce enacted by the Congress of the United States. Those fares and rates were lawful, hence presumptively reasonable, and neither the officers of the state of Minnesota nor any court, state or federal, could legally adjudge them unreasonable until they had been denounced by the Interstate Commerce Commission. Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553. The fares and rates and the traffic in intrastate commerce were so inextricably interwoven with the fares and rates and the traffic in interstate commerce that a general and substantial reduction of the fares and rates in either by its necessary operation compelled a similar reduction in the other, because the interstate commerce act forbids the discrimination that would otherwise result and because traffic will move only at the lowest available rates. The subject of the fares and rates in interstate commerce through this region is national in its character and capable of regulation by uniform rates, and the railroad companies are therefore free to make and regulate them subject only to the orders of the Interstate Commerce Commission. The officers of the state of Minnesota by the acts and orders challenged made a general and sweeping reduction of 33⅓ per cent. in passenger rates within that state, of 20 per cent. to 25 per cent. in rates on general merchandise, of 7.37 per cent. on grain, coal, live stock, and lumber, and of 13.58 per cent. on in-rates to distributing points.

The effect of the necessary operation of these acts and orders was substantially to burden and directly to regulate the interstate commerce of the companies by causing the transformation of that part of their transportation upon which their former interstate rates were higher than the sums of the locals over the border towns in Minnesota into local commerce at those sums, or by causing the companies to reduce their interstate fares and rates affected by the reduced local fares and rates to a parity therewith. This effect was unavoidable because the interstate commerce law prohibited the companies from giving to Minnesota towns and cities the undue and unreasonable advantage and from subjecting the cities and towns of other states in the vicinity to the undue and unreasonable disadvantages which a maintenance of their former interstate fares and rates and the prescribed local fares and rates would have wrought, and because passengers and freight will move at the lowest available rates.

This effect was not like that of the directions concerning the movements of particular trains, the inspection of animals to guard against disease, the reduction of intrastate rates on one or a few articles of commerce, and similar regulations which were sustained in the cases in the earlier part of this opinion and in others of like character, because their effect upon interstate commerce was so incidental and remote as to be negligible. The effect of these acts and orders was substantial, direct, controlling, and compelling. They are general and sweeping in their terms, they reduce the fares and rates on the great body of intrastate commerce in the state of Minnesota from 7 to 33⅓ per cent., and their inevitable effect is directly and unavoidably to regulate much of the interstate commerce of the defendant com-

panies and unavoidably to cause each of them great loss of revenue therefrom.

No case has been found in the books in which the facts disclose a more substantial burden imposed upon interstate commerce by the acts or orders of the officers of any state than that which the effect of the necessary operation of these acts and orders entails upon the interstate commerce of these companies. If in the early proceedings in the Northern Pacific Case the Supreme Court was moved to say, of the issue whether the necessary effect of these acts and orders was to interfere with and to regulate interstate commerce, "the question is not, at any rate, frivolous," how, now, that their necessary effect upon that commerce has been indisputably proved to be not only general and substantial, but controlling and compelling, may they escape the ban of the Constitution? If one state might by such radical reductions of its local fares and rates below legal interstate fares and rates constitutionally use the laws of trade and the prohibition of discriminations in the interstate commerce law to force like reductions of interstate rates, all states might do so, and the power of the states to regulate fares and rates in interstate commerce would be supreme and that of Congress and the Interstate Commerce Commission inferior and futile. Such does not seem to be the law.

Each of the acts and orders challenged has the natural and necessary effect substantially to burden and directly to regulate interstate commerce, to create undue and unjust discriminations between localities in Minnesota and those in adjoining states, and it is unconstitutional and void.

The master also found that the maximum state rates prescribed by these acts and orders produced incomes insufficient to pay the cost of earning them, taxes and just returns upon the real values of the Minnesota properties of the defendants respectively used to carry on their intrastate commerce in that state. The actual earnings, taxes, and cost of conducting transportation during the year ending June 30, 1908, the year when the fares and all the rates, except the commodity rates, were in actual operation, were proved, and the master found that the net freight income for that year of the Northern Pacific Company from its Minnesota intrastate freight business yielded an annual return of only 1.941 per cent. on the value of its property used to produce that income, and that if the commodity rates had been in operation this percentage would have been still smaller, that its net income from its intrastate passenger business was sufficient to yield an annual return of only 4.2 per cent., and its net income from all its intrastate business in Minnesota an annual return of only 2.909 per cent. of the values of its property assignable thereto respectively. He reported that the net income of the Great Northern Railway Company from its Minnesota intrastate freight business was sufficient to yield an annual return of only 5.468 per cent. of the value of its property assignable to that business, and if the commodity rates had been in force the return would have been less than 5 per cent., that its net income from its Minnesota passenger business yielded a return of only .925 per cent. on the value of its property assignable to that business, and that the net income from all its Minnesota intrastate business

was sufficient to yield an income of only 3.359 per cent. on the value of its property assignable thereto. His report is that, if the acts and orders of which complaint is made had been in force during the fiscal year 1907, the year to which the proof is especially addressed in the case of the Minneapolis & St. Louis Company, the net income derived from that company's Minnesota intrastate business would have been sufficient to pay an annual return of only 2.93 per cent. on the value of its property assignable to that business, that the net income derived from its Minnesota passenger business would have yielded an annual income of only 1.79 per cent. on the value of its property assignable to that business, and that its Minnesota net income from intrastate freight and passenger business would have been sufficient to earn an annual return of only 2.47 per cent. on the value of its property assignable to all its Minnesota intrastate business.

All the Minnesota property of each of these companies devoted to transportation had always been and is used at the same time to conduct both intrastate commerce and interstate commerce. In determining whether or not the fares and rates challenged are confiscatory, the Minnesota intrastate commerce of these companies must be considered by itself. That commerce may receive the benefit of none of the revenue and must bear the burden of none of the cost of interstate commerce. The portion of the value of all Minnesota property of each of these companies which is chargeable with the economic duty to produce a just return by means of the intrastate commerce of that company must therefore first be ascertained, for that is the basic measure of the reasonableness of the return produced by the Minnesota fares and rates and the criterion for the trial of the issue confiscation vel non. In the ascertainment of the necessary facts and in the determination of this issue the master pursued this approved method in the case of each company. Take the Northern Pacific Company for example. He first found the real value of that portion of its Minnesota property devoted to transportation in Minnesota during the year ending June 30, 1908, to be $90,204,545, he apportioned this value between its freight business and its passenger business in that state that was conducted by the use of the property thus valued on the gross earnings basis, and in that way found $66,445,570 thereof assignable to its freight business and $23,758,975 assignable to its passenger business. On the same basis he divided the values thus respectively assigned to freight business and passenger business between the interstate business and the intrastate business of the company conducted by the use of the property so valued, and in that way apportioned $10,867,837 thereof to the company's intrastate freight business, and $8,159,782 thereof to its intrastate passenger business. From the evidence produced he found that the total freight revenue earned by the use, during the year ending June 30, 1908, of the company's Minnesota property valued, was $9,823,508.35, and that the total passenger revenue was $3,512,538.52. These earnings he divided between intrastate commerce and interstate commerce and found that the intrastate freight earnings were $1,606,771.26, and the intrastate passenger earnings were $1,206,333.09. He found from the evidence that the cost of the freight business conducted by the use of the

property valued was $5,343,718.25, and the cost of the passenger business was $2,311,631.95. He divided the freight and passenger cost respectively between the interstate commerce and the intrastate commerce and found that the cost of the intrastate freight business was $1,355,273.82, and the cost of the intrastate passenger business was $863,325. He deducted the annual intrastate freight cost from the annual intrastate freight earnings, and thus found the annual net intrastate freight income which, divided by the value assigned to the intrastate freight business, produced the 1.941 per cent. which he found to be the annual return which the rates challenged yielded upon the value of the Minnesota property of the Northern Pacific Company used to conduct it. In the same way the annual return upon the value assigned to the intrastate passenger business of this company was found, and the same method was pursued in ascertaining the returns yielded to each of the companies by the assailed fares and rates. His findings upon all these matters are terse, clear, and complete. They set forth the values found, the values assigned, the gross earnings, the net earnings, the cost found, the cost assigned, and where they are not drawn directly from the testimony of witnesses they carefully detail the methods and the computations by which they were reached. These findings are drawn from evidence which the master has reported to the court and which fills 19 printed volumes. Exceptions to them and to the report have been taken, and counsel for the defendants by brief and argument seem to have presented every contention and suggestion in opposition to them that learning, ingenuity, and ability enable man to conceive.

Fortunately it is unnecessary to enter upon any review of the authorities, or any discussion of the rules of law, by which the validity, under the fourteenth amendment to the Constitution of the United States, of the acts and orders which prescribed the fares and rates in question must be tried. They are presumed to be reasonable and valid because the Legislature and the Commission have the power to prescribe fares and rates of this nature on condition that they do not have the effect to deprive the owners of any property whose use is subjected to them, and the legal presumption is that the officers of the state have faithfully discharged their duties and acted within the constitutional limits of their power. Proof that they have not done so or that their acts and orders are violative of the federal Constitution must be clear.

It is, however, beyond the power of a state or of its officers to establish or maintain fares and rates the effect of the enforcement of which is equivalent to the taking of the property of public service corporations for public use without compensation, unless justice to the public requires such a confiscation. Fares and rates must be just, both to the people and to the carrier. In the case in hand justice to the people does not demand that the property of the defendant companies shall be taken for their benefit without just compensation, and fares and rates which do not yield a reasonable return upon the real value of the property of the railroad companies subjected to them are confiscatory in their nature, and the acts and orders which establish or maintain them are unconstitutional and void. "What the company is

entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public." Smyth v. Ames, 169 U. S. 466, 547, 18 Sup. Ct. 418, 42 L. Ed. 819; San Diego Land Co. v. National City, 174 U. S. 739, 757, 19 Sup. Ct. 804, 43 L. Ed. 1154; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 442, 23 Sup. Ct. 571, 47 L. Ed. 892; Willcox v. Consolidated Gas Co., 212 U. S. 19, 41, 29 Sup. Ct. 192, 53 L. Ed. 382; Missouri, Kansas & Texas Ry. Co. v. Love (C. C.) 177 Fed. 493, 495.

Numerous exceptions are leveled at the master's findings of the values of the Minnesota properties of the companies used to conduct their intrastate transportation on the ground that they are too high. Speaking generally the same classes of evidence were introduced by the respective parties in the case of each of the companies and what will be said of the proof and the finding in the case of the Northern Pacific Company is applicable to the proof and the finding in the cases of the two other companies. Evidence of the cost of reproduction of the Minnesota property of each of the companies, of the original cost of acquisition and construction thereof, and of the average market value of the stocks and bonds of each of the companies for a reasonable period of time prior to June 30, 1908, was introduced before and considered by the master. He found the value of the Minnesota property of the Northern Pacific Company devoted to public use to be $90,204,545. He found the average market value of the stocks and bonds of the company for a period of five years was $509,824,723. The track mileage of the company in Minnesota was 21 per cent. of the track mileage of the Northern Pacific system, and, hence the value of the Minnesota property of the company upon this basis was $107,630,191, nearly $17,000,000 more than the value found by the master. In the absence of competent evidence segregating the property of a railroad company devoted to transportation from its other property, all its property represented by the market value of its stocks and bonds is presumed to be devoted to public use. Atchison, Topeka & Santa Fé Ry. Co. v. Sullivan, 173 Fed. 456, 466, 97 C. C. A. 1, and the cases there cited. There was evidence in this case, however, that a considerable portion of the property of the Northern Pacific Company represented by the value of its stocks and bonds was not devoted to transportation; but there was no reliable evidence of the value of this property or of its relative value to the value of all the property of the company. For this reason the master rightly and unavoidably concluded that the market value of the stocks and bonds was not a sound premise from which to deduce the value of the Minnesota property of the company devoted to public use. Counsel for the defendants assail this conclusion and found an argument for a lower valuation upon this market value of the stocks and bonds and a statement in a monthly balance sheet of the company which they introduced in evidence and which contained a statement of certain accounts of the company and of the book value of certain securities that appear from that statement not to be devoted to public use and to be held by the company. But this balance sheet was not an admission of the company against interest, the record contains no

competent evidence of the value of these securities or of the accounts, and therefore the contention of counsel here is without foundation. For similar reasons the market values of the stocks and bonds of the other two companies present no credible evidence that the values found by the master were excessive.

The master found the original cost of the acquisition and construction of the entire railroad systems of each of the companies and the proportion thereof assignable on a track mileage basis to Minnesota. The amounts thus found prove to be much less than the values ultimately found by the master, and for this very good reason: These railroads were pioneers; they were built in large part over the prairies of Minnesota before they were settled and before many of the existing towns, villages, and cities along their lines came into existence. A large part of the right of way of the Northern Pacific Company was granted to it by the nation. The cost of rights of way from 5 to 40 years ago through wild lands, and through towns and villages whose population and the value of the property in which have since been multiplied by from 2 to 10, is obviously no criterion of the value of those rights of way in 1908, when they were used under these fares and rates and when agricultural lands in Minnesota were worth from $35 to $100 an acre, and rights of way and lands for yards and sites for stations in cities like St. Paul and Duluth have wonderfully increased in value. It is a fair return upon the reasonable value of their Minnesota property in 1908 to which these companies were entitled, and the cost of that property at times varying from 5 to 40 years ago may be some evidence; but it is certainly no criterion of its value in that year. In view of these facts the master rightly decided that the cost of reproducing this property new was a more rational and reliable measure of its real value than the original cost of its acquisition and construction or the market values of the stocks and bonds of the companies, and upon that basis he made his findings.

The Railroad Commission seems to have reached the same conclusion at an earlier date, for in the first part of the year 1906, before these suits were commenced, they had employed Mr. Dwight C. Morgan as their engineer, and had instructed him and had requested the railroad companies to find the respective values of their railway properties in Minnesota on the basis of the cost of their reproduction new. This basis is described in the instructions of the Commission to the companies under date of March 12, 1906, in these words:

> "In estimating the value of the physical, real and personal property of the railway companies in the state of Minnesota, an estimate of the cost of reproducing them new is deemed essential as the prime factor. In respect to real estate and construction, this prime estimate is to be made as though the existing railways were not constructed and the regions through which they now extend were occupied as now, by the settlements, improvements, and varied industries. * * * The present value of the physical properties of the railways will be obtained by deducting from the cost of reproduction of deteriorations by time and use, on the date corresponding to that of the estimated cost of reproduction."

A schedule of about 40 items originally suggested by the Commission, and perhaps subsequently somewhat modified, was used by both

parties in these cases, and their evidence was directed to the values of these items on the basis of the cost of their reproduction new.

The first and largest item on the schedule was "lands for right of way, yards and terminals." In the case of the Northern Pacific Company the evidence on behalf of the complainant tended to show that the cost of reproducing this item was about $25,000,000. The claim of counsel for the Commission now is that the value of this item does not exceed $9,498,099.27, and the master found that the cost of its reproduction and its value were $21,240,562. In the testimony the item is divided into lands for rights of way, yards, and terminals in St. Paul, Minneapolis, and Duluth, which for brevity will be called "terminals," and other lands for rights of way, yards, and sites for stations through the other cities, towns, and villages and through the country, which will be termed "lands outside of terminals." The evidence for the defendants regarding this item consists of an estimate made and verified by Mr. Morgan and corroborating purchases and sales. Mr. Morgan had never bought and sold any real estate, except his homestead, nor was he acquainted with the value of real estate in general. To ascertain the value of the terminals in each of the three cities he took from the county records the considerations recited in the records of deeds of a large number of lots and lands in each of the cities, compared them with the assessed values of those lots and lands, and found the per cent. that on the average the assessed values were of the considerations recited in these records. In St. Paul this was about 60 per cent. He then laid out strips of lands of varying widths along each side of the railway lands he desired to value, divided these strips into such sections as he thought were of about uniform value, found the values of the land in these sections from their assessed values on the theory that the assessed values were, in St. Paul, 60 per cent. of their real values. From these values of the sections of his strips he deduced the values of the railway lands between the strips by a comparison of areas. To the values of the railway lands thus ascertained he added 75 per cent. because in his opinion it costs railroad companies 75 per cent. more than the normal market value of lots and lands in these three cities to obtain such irregular tracts as they need and now own. To ascertain the value of the lands outside of terminals, he searched out himself and by means of employés the prices at which many lots and lands throughout the region traversed by the railroads had been sold, and from these prices he estimated the value of the lands of the railway companies, and then multiplied these values by three, because, as he testified, it costs railway companies three times the normal value of lands to procure the irregular tracts necessary for their rights of way and station grounds through agricultural lands and the smaller towns, cities, and villages. By these means Mr. Morgan found and testified that the cost of reproduction, and hence the present value of the land for right of way, yards, and terminals, of the Northern Pacific Company, was $15,385,078.47. At the request of counsel for the defendants he made another estimate in which he omitted to use the multiples 75 per cent. of the normal terminal values and three times the normal values of lands outside the terminals, and disclosed there-

in the fact that if these multiples were not used his estimate would become $9,498,099.27, the value for which counsel for the defendants argue. But neither Mr. Morgan nor any other witness came to say that the latter was the true cost of reproduction or the real value of this item of the schedule. The defendants also introduced evidence of purchases and sales that tend to sustain Mr. Morgan's estimate of the value of this item.

On the other hand, the evidence for the complainants was, as to the terminals in the three cities, the testimony of three residents of each of those cities engaged in the real estate business, of long experience and accurate knowledge of the values of real estate in their respective cities, as to the values of the terminals of each of these companies, the testimony in the Northern Pacific Case of Mr. Cooper, the land commissioner of that company, who was in charge of its rights of way and had purchased for it since 1903 property for which there had been paid $6,139,542.35, and who had a general knowledge of the property in question and its value, the testimony in the cases of the other companies of officers thereof similarly qualified, and evidence of purchases and sales which tend to sustain the evidence of these witnesses. As to the lands outside of the terminals, the Northern Pacific Company produced the testimony of Mr. Cooper and proof of purchases and sales for railway purposes which tend to prove that his testimony of the cost of reproduction and the value of the property was not substantially above prices that had actually been paid for like property. He testified that he had much knowledge from his experience and observation of the cost and value of these lands outside the terminals, that he verified his knowledge by investigating the purchases and sales of property in the vicinities of these various rights of way, that the necessary cost of obtaining such rights of way by a railroad company was three times as much as the normal value of the land, and that his testimony of the value of these tracts was based upon that fact. The evidence in the other two cases was of the same character. In each of the three cases the master added to the values of the terminals in St. Paul and Minneapolis, established by the testimony of the real estate dealers and Mr. Cooper, 5 per cent. for the cost of acquisition and consequential damages and to the values of the lands for terminals in Duluth, verified by the witnesses for the companies, 25 per cent. for railroad value and the cost of acquisition and consequential damages, and from the values of lands outside terminals, established by the evidence for the companies, he deducted 25 per cent. The result was that his ultimate finding of the value of the first item on the schedule was about $4,000,000 below the value which the testimony of all the witnesses, except Mr. Morgan, sustained, about $6,000,000 above that which Mr. Morgan's testimony supports, and about $11,000,000 above the amount which counsel for the defendant now urge the court to adopt. This finding of the master is assailed because he allowed 5 per cent. of the value of the terminals for cost of acquisition and consequential damages, because he increased the values of the terminals at Duluth, established by the testimony of the real estate dealers, 20 per cent. for the reason that they failed to give due weight to the value of these terminals

for railway purposes, because the companies' estimates of the value of this item included an addition to the values of the St. Paul and Minneapolis terminals fixed by the real estate dealers of 25 per cent. thereof for railroad value, and because he failed to follow the theory of Mr. Morgan and to adopt the value which Mr. Morgan would have found if he had discarded his multiples.

But the evidence in this case is conclusive, nay, we may say it is without conflict, that every railroad company is compelled to pay more than the normal market value of property in sales between private parties for the irregular tracts it needs and acquires for rights of way, yards, and station grounds. The defendants' witness, Mr. Morgan, testified that in his opinion the companies necessarily paid three times the normal value for the lands outside of the terminals in the three cities and 75 per cent. more than the normal value for their terminals within those cities. The master in effect found that the cost of reproduction and the present value of the lands for the terminals in the three great cities, including therein all cost of acquisition, consequential damages, and value for railroad use which he allowed, was only about 30 per cent. more than the normal value of the lands in sales between private parties. He found the value of the lands outside the terminals to be only twice their normal value. Findings of lower values would have been contrary to the great weight of the evidence and without substantial support therein.

The measure of the value of real estate is its market value for its most available use. There was uncontradicted evidence that the most available use of the terminal lands in Duluth, the use for which they were of the greatest value, was their use for railroad purposes, that they were indispensable for those purposes, that the real estate dealers who testified to their values had fixed them originally in 1906, without regard to their value for railroad uses, and that since that time they had advanced in value from 15 to 25 per cent. Thus the proof is ample to sustain the addition to this 1906 estimate of the value of these lands of 25 per cent. thereof for railroad value, cost of acquisition, and consequential damages which the master allowed.

But counsel argue that this court should disregard Mr. Morgan's multiples and fix the value of this entire item at the amount that his estimate would produce if his multiples were not used, $9,498,099.27, because the original presumption was that the fares and rates fixed by the Legislature and the commission were just and reasonable, clear proof was requisite to overcome that presumption, if there is any substantial evidence to the contrary the proof is not clear, and the master's findings must be presumed to be wrong, and Mr. Morgan's evidence is sufficient to enable one fairly, in the exercise of an honest judgment, to disregard the findings of the master and the evidence which supports it, and to adopt the lowest value claimed. This contention is urged with such force and frequent repetition in brief and argument, and is applied so persistently to the various specific findings of the master, that it deserves consideration.

Rate making, the determination of what shall be the railroad rates in the future, is a legislative function. But rate judging, the determination whether rates already made yield a fair return upon the rea-

sonable value of the property used to earn them, or take that property without just compensation in violation of the Constitution, is a judicial function. Prentis v. Atlantic Coast Line, 211 U. S. 210, 226, 228, 29 Sup. Ct. 67, 53 L. Ed. 150; Missouri, Kansas & Texas R. R. Co. v. Interstate Commerce Commission (C. C.) 164 Fed. 645, 648. Why should the presumption that the judicial officer, on whom the duty to perform the latter function is imposed by the law, rightly discharges that duty and reaches just conclusions, be less persuasive than the presumption that legislative officers faithfully discharge theirs? When a rate is made under legislative authority, the legal presumption is that it is fair and reasonable, and proof to the contrary must be clear, especially in cases in which the rates challenged have never been in operation and injunctions are sought while their effect is yet speculative.

But the question whether fares and rates which have been put in operation confiscate the property of the companies in violation of the Constitution of the United States is a judicial, and not a legislative, question. And when that issue is presented the rules of law, of equity, and of practice applicable to the determination of judicial questions have effect. When, therefore, rates have been tried by actual use for many months, and their effect has become known and is proved, when the issue whether or not they take the property of the railroad company without just compensation has been made in a competent court, and all parties have introduced, in the presence, and subject to the cross-examination and rebuttal, of each other, all the evidence they desire, when that issue and the numerous subordinate issues it involves have been heard and decided, as they have been in the case in hand, by a master, who has personally heard the testimony of every witness, received and examined all the evidence, and made specific findings of every material issue of fact in the case, the judicial presumption arises that his findings are right. This is a presumption of reason as well as of law, a presumption that forces itself upon and compels the reflective mind. Take the general issue. The Legislature and the Commission decided it upon the information they had acquired as to the probable effect of the rates they were making before those rates were tried. The master decided it after the fares and all the rates, except the commodity rates, had been tried for many months and their actual effect was known and proved. The former decision was based on the conjectural effect of the rates; the latter, on their actual effect. The master decided this issue upon a full trial, in which all parties produced all their evidence, subject to the cross-examination and rebuttal of each of the other parties, in the manner which the wisdom and experience of centuries has taught is most conducive to the discovery of the truth and the administration of justice. The Legislature and the Commission decided it without such trial or such proof.

Doubtless, if the fares and rates had been tested by the actual operation of the railroads under them, and the plenary proof of their effect and of the other facts presented to the master had been introduced before the Legislature and the Commission, they would have reached the same conclusions which the evidence forced upon the master's mind. They decided the issue upon evidence more conjectural

or speculative; he, upon proof more certain and conclusive. And the presumption that a master learned in the law, accustomed by long experience at the bar and on the bench to hear and analyze evidence and draw just conclusions therefrom, has faithfully discharged his judicial duty and reached right results, is not less strong than the presumption that the Legislature and the Commission rightly discharged their official duties. The result is that when, after fares and rates have been in effect for months, plenary proof of that effect and of other facts pertinent to the issue of confiscation vel non is made before a master who finds the facts, the legal or judicial presumption that his findings are just and right, while not conclusive, is superior to the original presumption that they were just and reasonable, which arose before they were or could be tried, and it prevails over it. The question, therefore, upon the exceptions to the master's report, is not, is there any evidence upon which one might fairly, in the exercise of an honest judgment, reverse his findings? But it is, are the findings which are presumptively right sustained by clear proof? If they are, they should be affirmed, and the exceptions to them should be overruled.

Returning now to the finding of the value of the first item of the schedule, it is sustained by the testimony of nine real estate dealers familiar with the values of the properties in their respective cities, by the testimony of the officers of the companies who were well acquainted with the properties and their values, who had purchased rights of way that cost many millions of dollars, and by the corroborative evidence of purchases and sales at prices approximating the values found. It is met by the theoretic value of Mr. Morgan, based on his assessment sales method of proof, and by evidence of purchases and sales corroborating it. But the foundation of this value is what copying clerks wrote that grantors in deeds wrote were the considerations of their conveyances of certain properties, and all of these parties were strangers to the parties to this suit. It is conditioned by Mr. Morgan's opinion of the number of such considerations it was necessary to use to discover the true relation of considerations of deeds or presumptive values of properties described therein to their assessment values, by his opinion as to the width of the strips on each side of the rights of way and as to the number and the lengths of the sections of the strips requisite to ascertain just measures of the values of the rights of way between them. He concedes, and counsel for the defendants do not deny, that his method would not reliably indicate the value of any specific lot or tract of land of moderate dimensions, and it is difficult to understand how it can escape the maxim, "falsus in uno, falsus in omnibus." A careful consideration and analysis of Mr. Morgan's testimony and of the other evidence introduced to support it has convinced that they are too indirect, uncertain, and inconsequential to overcome the direct and convincing proof of the values of these properties which the complainants have made, and the exceptions to the master's findings of these values must be overruled.

Exceptions were taken to the allowance of interest at 4 per cent. per annum on the cost of the reproduction of the railroad properties during one-half of the estimated times of their construction. But the evidence is conclusive that moneys invested for the purchase of

rights of way for, and in the construction of, railroads, ordinarily produce no net income during the period of construction, that the amount of capital thus losing returns is ordinarily equal to one-half of the cost of reproduction during the entire period of construction, or to the entire cost during one-half of that period. There is no doubt that interest at a fair rate on the capital invested in materials and labor that remain idle during construction is as much a part of the cost of constructing or reproducing a railroad as is the money paid for those materials or that labor. Brunswick Water District v. Maine Water Company, 99 Me. 371, 59 Atl. 537, 542. Mr. Morgan, the engineer and witness for the defendants, allowed in his report to the Commission, and verifies the justice of an allowance, of 4 per cent. per annum during one-half of the period of construction; but the amounts he allowed were less than those found by the master, because his estimates of the cost of reproduction and of the times requisite for construction were less. The weight of the testimony on this subject, however, sustains larger amounts than those fixed by Mr. Morgan or the master, and there was no error against the defendants in the latter's finding and allowance of the item here under consideration in either of the cases in hand.

The Minnesota Transfer Railway Company is a corporation and the joint agent of the owners of ten different lines of railway for the interchange of their freight traffic in St. Paul and Minneapolis. Each of the ten owners owns one-tenth of the property of the Transfer Company by virtue of an ownership of stock. The St. Paul Union Depot Company is a like corporation and joint agent of the owners of nine lines of railroad for the exchange of their passenger traffic, and it is owned by nine constituents in the same way. Each of the three defendant companies owns one share in each of these terminal companies, and the latter corporations and their properties are operated and used as tools of the railroad companies that own them, to conduct transportation for their exclusive use and benefit. The defendants complain because the master allowed to each of these three companies $1,186,191 as the cost of reproduction and the value of their respective interests in the property of these subsidiary companies, and because he allowed to the Northern Pacific Company $1,180,151 for the cost of reproducing and the value of its interest in a similar corporation and its property used by the Northern Pacific Company for a like purpose at Duluth. It is not claimed that these interests are not worth, or that their cost of reproduction would not be, the amounts allowed; but it is contended that these values are not allowable at all, because they are represented by the stocks and bonds of the subsidiary companies. But these interests in these terminal corporations and their property are the most indispensable parts of the Minnesota properties of the defendant companies used to earn the fares and rates here in question, and any estimate of the value or of the cost of reproduction thereof which omitted the value or the cost of reproduction of these interests would have been incomplete and deceptive. The master rightly considered and allowed their value.

There are exceptions because the master allowed to the Northern Pacific Company $1,613,612.76, to the Great Northern Company

$3,219,642, and to the Minneapolis & St. Louis Railroad Company $608,896.43, for the solidification and adaptation of their respective railroads, and deducted nothing from the cost of reproduction for depreciation. But these amounts are those allowed by the defendants' engineer and witness Morgan in his original estimates of the cost of reproduction which he reported to the Commission, and there is much other evidence in the record to sustain them. It is clear that a new railroad may appreciate or depreciate as it grows older. It may be renewed, repaired, and improved day by day and year by year as it is operated, until its embankments become more solid, its culverts and bridges firmer and more reliable, its ties and rails more steadfast and secure, and its rolling stock more seasoned and better adapted to its service and to the railroad it traverses, and until the whole property becomes more valuable than it was when it was first constructed. On the other hand, its embankments and its roadbed may be neglected and permitted to deteriorate by the action of rain, snow, and frost, its ties may be allowed to become partially decayed, its bolts and rails loose, and its rolling stock worn, without adequate repairs, until the entire property suffers great depreciation. Whether at a given time a railroad property is more or less valuable than it would be if it had just been constructed is a question of fact, that in a suit of this nature must be answered by the evidence. That evidence in this case is that the railroads, rolling stock, and appurtenances which constitute the great transportation machines of these companies in Minnesota are in better condition for use, more efficient, more steadfast, better adapted to each other, than if their construction was just completed, that all depreciation has been offset by appreciation, and that values to the amounts here allowed by the master have been added to the values of these properties new, by their age, their repairs, their renewals, their adaptation, and the assured efficiency that comes from constant careful maintenance and operation. There was no error in these allowances.

Many other exceptions were taken to items which constitute parts of the values found by the master. Each one of them has been examined in the light of the evidence, the arguments, and the briefs. They challenge matters less important than those that have been reviewed, and no good purpose would be served by stating and discussing them in detail. Suffice it to say that none of these exceptions is sustained by the record, and the result is that the findings of the values of the Minnesota properties of the three companies by the master must be confirmed.

The master divided the values of the Minnesota properties between freight business and passenger business and between interstate business and intrastate business on the basis of the respective gross earnings of these classes of business. Counsel for the defendants challenge this basis of division, and contend that the apportionment should have been made on the basis of the use made of the property by each of these classes of business, measured either (1) by the aggregate number of the ton miles and passenger miles of the respective classes, or (2) by the aggregate number of the car miles and engine miles of these classes. They say that if that proportion of the value of the property

of a company which the number of ton miles hauled by it in Minnesota bears to the aggregate of its ton miles and passenger miles in Minnesota be assigned to its freight business, and that proportion which its number of passenger miles bears to the same aggregate be assigned to the passenger business, and if that proportion of the value thus assigned to the freight business which the aggregate of the car miles and engine miles appertaining to the intrastate freight business bears to the car miles and engine miles used in the freight business be assigned to the intrastate freight business, and the same method be pursued in apportioning value to the intrastate passenger business the apportionment will be more equitable and just. The issue is between apportionment by use without regard to the worth or value of the use and apportionment according to the value of the use. The latter basis seems to be more logical and rational. Capitalization is founded on the worth of use, not on mere use. The value of property and of investment in every form is measured by the value of its use, not by its use divorced from the value thereof. The Minnesota Railroad Commission, the railroad companies, all rate makers, base their rates primarily on the worth of the use of the railroad machines by the various classes of freight and by the passengers, and not on the amount of that use. The rate for hauling a ton of merchandise of the first class a mile is not five times the rate for hauling a ton of merchandise of class E a mile, because the former ton mile uses the railroad property five times as much as the latter, but because the use by the former is worth more than the use by the latter. Moreover, there is no unit of measurement of ton miles and passenger miles, of freight car miles and freight engine miles, or of passenger car miles and passenger engine miles, divorced from the values of the uses they make of the railroad property, from the classes of loads they carry and the distances these loads are hauled. Indeed, there is no proportioning or measuring relation between such varying uses of property, when no regard is given to the values of these uses.

On the other hand, the values of the uses, the earnings of the property, unavoidably condition the value of the property used, and present a natural and equitable basis of apportioning that value to these uses. Cases may indeed be imagined in which this basis does not produce persuasive results. One of them was suggested by Mr. Justice Brewer in Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins, 176 U. S. 167, 176, 20 Sup. Ct. 336, 44 L. Ed. 417, and others of like character have been presented in argument by counsel. But no basis has been suggested and none has been discovered which seems to be more equitable or more accurate. It may be that there is no basis or method that brings perfect or ideal results. But because the ton mile and passenger mile basis has no common unit of measurement, because that basis and the car mile and engine mile and the passenger car mile and passenger engine mile bases exclude the effect of the values of the uses made of the railroad property by the various classes of freight and by the passengers carried, because there is really no proportioning relation between uses divorced from their values and the value of the property used, because these bases ignore the differences in the classes of freight carried and in the distances they are hauled, because the ap-

portionment of the value of railroad property on the basis of the gross earnings of the classes of business, which disclose approximately the values of their uses of it, gives effect to these material differences, appeals more persuasively to the reason and produces results more equitable than any other basis suggested and because this basis has commended itself to the judgment of, and has been adopted by, the courts upon whom duties of apportionment of this nature have been imposed in like cases, the master was justified in following their decisions and his action and report in this regard is confirmed. Ames v. Union Pacific R. R. Co. (C. C.) 64 Fed. 165, 179; Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins (C. C.) 90 Fed. 363, 370; St. Louis & S. F. Ry. Co. v. Hadley (C. C.) 168 Fed. 317, 348–352; Northern Pacific Ry. Co. v. Keyes (C. C.) 91 Fed. 47, 56, 57; In re Arkansas Railroad Rates (C. C.) 163 Fed. 141, 142; Missouri, Kansas & Texas Ry. Co. v. Love (C. C.) 177 Fed. 493, 497.

In the cases of the Northern Pacific Company and the Great Northern Company exceptions are urged to the master's division of common cost between freight business and passenger business, to his finding that the cost of doing intrastate freight business was 2½ times the cost of doing interstate freight business, and to his finding that the cost of doing intrastate passenger business was 15 per cent. more than the cost of doing interstate passenger business. About 60 per cent. of the cost of doing the passenger and freight business in Minnesota consisted of items which in themselves disclosed the fact that they were incurred either in doing the passenger or in doing the freight business. All parties conceded that these items were properly assigned to the freight business and the passenger business, respectively, by the railroad companies, and these are termed "allocated items." The remaining 40 per cent. of the cost consisted of items incurred for the common benefit of the passenger business and the freight business, and there was no method of assigning these items that was certain to be mathematically and absolutely correct. Two methods were advocated by the respective parties to this controversy. The defendants introduced in evidence an allocation of these items made by Mr. Conway W. Hillman, an expert railway accountant, without extended experience as a railroad operator, whereby, in the Northern Pacific case, about $400,000 more common cost, and in the Great Northern case, about $900,000 more common cost, was assigned to the passenger business, and a correspondingly less amount to the freight business, than was assigned by the companies and confirmed by the master This division was supported by the testimony of Mr. Hillman that in his opinion it was right and reasonable and by his statement of his reasons for this belief. But no other witness came to support his view. On the other hand, a large number of witnesses, who had long been familiar with the details of the expense of operating railroads, who had enjoyed a long experience in their actual operation, and who had considered in the light of their knowledge and experience and formed opinions concerning a just division of this common cost, testified that the allocation made by the companies and finally adopted by the master was fair and just. This testimony was buttressed by evidence that this basis of division had been used by these and oth-

er railroad companies for their own information and convenience for some time before the questions here at issue had arisen, and that it had at one time received the approval of the Interstate Commerce Commission. So it is that whether the knowledge, experience, and opportunities of the witnesses to form correct judgments upon this issue or their numbers be considered, the great preponderance of the evidence sustains the division made by the master, and it must stand.

All admit that the cost of doing intrastate business exceeds the cost of doing interstate business, and the issue is, how much does the cost of doing the former exceed the cost of doing the latter? Upon that issue many hundreds of printed pages, a mass of evidence too vast for recital or review, has been examined and considered by the master and the court. The evidence for the state consists of the testimony of Mr. Hillman, and the evidence for the complainants is the testimony of six men who have long been engaged in and are familiar with the actual operation of railroads and the expenses thereof. Many criticisms of the testimony of each of these witnesses, of their opinions, and of the reasons they give for them, have been made by counsel for the respective parties, and have been the subjects of study and reflection in the light of the evidence and the arguments. Mr. Hillman's conclusion in the Northern Pacific case, and it was similar in the other cases, was that the cost per ton per mile of doing intrastate business was about 44 per cent. more than the cost of doing interstate business. Starting with the cost of doing business which was entirely local upon certain branch lines of the company, a cost which he extracted from its records, and with the assumption that the cost per ton per mile of doing the local business on the main lines of the company was the same as it was on the branch lines, he derived this result from these premises, from other records and reports of the company, and from a long and intricate series of computations, assumptions, and deductions. No chain, however, is stronger than its weakest link, and an examination of the method he pursued and the bases upon which he founded his conclusion has convinced that the result he deduced is conditioned by so many of his own opinions and assumptions, unsupported by other persuasive proof, that his conclusion is entitled to no more weight than his opinion that it and the means by which he reached it are correct.

Many witnesses, however, whose evidence disclosed the facts that they had long been engaged in the actual operation of railroads, that they had learned and knew from actual observation and experience the conditions which increased and diminished the cost of the transportation of freight, and the relative effect of these conditions upon the cost of interstate and intrastate transportation, that they were familiar with the details of the relative expenses of doing intrastate and interstate freight business, witnesses whose opinions are certainly as likely to be sound as that of Mr. Hillman, came and testified that, while they had no means of accurately and mathematically determining the fact, they were confident in the opinion that the cost per ton per mile of doing intrastate freight business was from three to six times the cost per ton per mile of doing interstate business. Counsel for the defendants say that a portion of local business is interstate

business and takes a short haul, and a portion of through business is intrastate business and takes a long haul, and that the effect of the testimony of these witnesses is not that the cost per ton per mile of intrastate freight business is from three to six times the cost of intertate freight business, but merely that the cost of local and short-haul business bears that relation to the cost of through and long-haul business. The testimony of these witnesses has been considered in view of this criticism, but the record does not seem to sustain the contention of counsel. For example, Mr. Elliott says that the average haul of intrastate freight in Minnesota on the Northern Pacific Railroad was about 104 miles, that the average haul of interstate freight touching Minnesota on that railroad was about 485 miles, that the expense of short hauls is much greater than that of long hauls, and after enumerating various other reasons he testified that these reasons "all lead me to the conclusion that the so-called short-haul intrastate business costs anywhere from three to six or seven times as much as the so-called long-haul, through interstate business." On his redirect examination he was asked if by the statement which has just been quoted he meant "to compare the average cost of the state business with the average cost of the interstate business," and his answer was, "That was my intention in making that statement in my direct examination last week." Mr. Doddridge testified in the Great Northern case that his judgment was that upon the basis of ten miles, excluding the Missabe ore traffic, the ratio of extra cost per ton per mile of intrastate Minnesota freight was at least three times, and maybe four times, as great as that of interstate freight. True, much was said in the testimony of these and other witnesses of the extra cost of short hauls over long hauls, and of local business over through business, for the witnesses had in mind that a larger proportion of the interstate freight than of the intrastate freight was through business and took the long hauls; hence the terms "local freight" and "local business" appear to have been frequently used in this case and in other cases of this character to mean intrastate freight and intrastate business. But, when all the testimony of each of the six witnesses for the complainants upon this issue is considered together, it is persuasive that their testimony clearly discloses their opinions that the cost per ton per mile of the intrastate freight business of the two companies in Minnesota was from three to six times the cost of their interstate freight business in that state. The testimony of Mr. Hillman on behalf of the defendants falls far short of prevailing over this evidence, and the exceptions to the finding of the master that the cost of the Minnesota intrastate freight business of the companies per ton per mile was at least 2½ times that of the interstate freight business must be overruled. For similar reasons the master's finding that the cost of intrastate passenger business per passenger mile was 15 per cent. more than that of interstate passenger business is confirmed. Missouri, Kansas & Texas Ry. Co. v. Love (C. C.) 177 Fed. 493, 499; In re Arkansas R. R. Rates (C. C.) 163 Fed. 141, 142; Chicago, Mil. & St. P. Ry. Co. v. Tompkins, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417; Minneapolis & St. L. R. R. Co. v. Minnesota, 186 U. S. 257, 262, 22 Sup. Ct. 900, 46 L. Ed. 1151; Ames v. Union Pacific R. R. Co.

(C. C.) 64 Fed. 165, 184; Northern Pac. R. R. Co. v. Keyes (C. C.) 91 Fed. 47, 54; St. Louis & S. F. R. R. Co. v. Hadley (C. C.) 168 Fed. 317, 348. The master did not rest his final conclusions on this relatively greater cost of intrastate business per ton per mile without a careful consideration and credit to the intrastate business of the relatively greater revenue per ton per mile derived from that business, thus reducing the percentage for the freight business in the Northern Pacific case, for instance, from 250 per cent. to 173+ per cent., and for passenger business from 115 per cent. to 113+ per cent.

Complaint is made that the master finds that the companies are entitled to a net return of 7 per cent. per annum upon the respective values of their properties devoted to this public use. The character of the business in which an investment is made, the locality in which it is placed, the returns secured in that locality from other investments of a similar nature, the uniformity and certainty of the return, and the risks to which the principal and the income from it are subjected condition the measure of a fair return upon capital invested. An investment in a bank, in a factory, in a mercantile, manufacturing, or agricultural business, is substantially free from regulation by the government and exempt from any duty to the public, except that of paying taxes. If the business in which such an investment is made is unprofitable, its owners may promptly discontinue its operation until more prosperous days come and then return to their undertaking. An investment in a railroad which operates in many states is subject to the regulation of its business by many governments. Its owners owe the duty to the governments and to the public to operate their railroad continually in days when its operation is unprofitable as well as when it is remunerative, a duty they must discharge under the penalty of the forfeiture of their property if they fail. In view of these facts, they ought to be permitted to receive a return large enough to enable them to accumulate in prosperous days a surplus sufficient to enable them to protect their property in days of disaster and to make their average return through days of prosperity and of adversity fair and just. The lands in Minnesota through which these railroads extend are fertile and productive. The cities, villages, and towns they reach are rapidly increasing in population and wealth, and the people they serve are thriving and successful. The evidence satisfies that the railroads are maintained in excellent condition, that they are efficiently and on the whole economically managed and operated, and are rendering commendable service. Justice to the thriving people they serve does not require that the owners of these railroad properties should be deprived of a fair return upon their values. To deprive them of such a return would prevent advances and tend to compel reductions in the wages and salaries of their employés, would tend to prevent the extension of their lines into portions of the state where the development and accommodation that railroad service assures would be welcome and may be needed, to deteriorate the character of the service they render, and to retard the general prosperity. The legal rate of interest on a debt in Minnesota, in the absence of contract, is 6 per cent., and by contract it may be 10 per cent. per

annum. Rev. Laws Minn. 1905, § 2733. Rational investments in agricultural, manufacturing, mercantile, and other industrial pursuits, and even well-secured loans, yield returns in Minnesota corresponding with these lawful rates. Investments in railroads and the returns thereon are at the risk of failures and partial failures of crops, of the disasters, delays, and expenses of unusual storms, snow, and cold, of the great financial disasters which occasionally prevent or delay the movement of traffic, and of the burden of continuous operation whether profitable or unremunerative. It is an axiom in economics that the greater the risk the greater must the return be upon invested capital, and the conclusion is irresistible that a net return of 7 per cent. per annum upon the respective values of the properties of these companies in Minnesota devoted to transportation is not more than the fair return to which they are entitled under the Constitution of the United States.

Other exceptions were taken by the defendants, but they must be overruled, because they are not of the controlling character of those that have been discussed, and they are not sustained by the record. For the same reasons, the exceptions of the complainants must share a like fate.

The findings of the master must be confirmed. The fares and rates prescribed by the acts of the Legislature and the orders of the Railroad and Warehouse Commission which have been considered, have been, are, and will be, as to each of these railroad companies, unreasonably low, unjust, and confiscatory. Each of those acts and orders is violative of the fourteenth amendment to the Constitution, and void, and a decree for the complainant must be rendered in each of the cases.

It is so ordered.

MEMORANDA OF APPARENT VERBAL INACCURACIES.

1. Page 15. After the word "before" in the tenth line from the bottom, the word "the" does not appear in manuscript.

2. Page 15. After the word "suits" in the tenth line from the bottom, the word "were" does not appear in manuscript.

3. Page 122. The word "mile" before the word "per" in the fourth line from the top should be omitted.

4. Page 141. The word "was" in the twenty-first line from the top should be "were."

5. Page 142. The word "was" in the sixth line from the top should be "were."

6. Page 147. The minus sign in the fourth line from the bottom should be a plus sign.

7. Page 148. The minus sign in the first line on the page should be a plus sign.

8. Page 157. The date "1906" in the seventh line from the bottom should be "1907."

9. Page 161. The date "1906" in the ninth line from the top should be "1907."

United States Circuit Court.

District of Minnesota.

THIRD DIVISION.

(In Equity.)

DAVID C. SHEPARD,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, GEORGE T. SIMPSON (substituted in place of Edward T. Young), IRA B. MILLS, CHARLES F. STAPLES, CHARLES E. ELMQUIST (substituted in place of William E. Young), E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH MICHAUD,

Defendants.

EMMA B. KENNEDY, ROBERT ELIOT TOD, ROBERT W. DE FOREST and WILLIAM STEWART TOD, executrix and executors, respectively, of the Will of John S. Kennedy, deceased, and HENRY F. DIMOCK,

Complainants,

vs.

GREAT NORTHERN RAILWAY COMPANY, GEORGE T. SIMPSON (substituted in place of Edward T. Young), IRA B. MILLS, CHARLES F. STAPLES, CHARLES E. ELMQUIST, (substituted in place of William E. Young), WALTER SCOTT, H. P. WEBB, JOHN PALM, L. LARSON, TOM GUNNESS and S. S. GLARUM,

Defendants.

HENRY A. JAMES,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, GEORGE T. SIMPSON (substituted in place of Edward T. Young), IRA B. MILLS, CHARLES F. STAPLES, CHARLES E. ELMQUIST (substituted in place of William E. Young), WALTER SCOTT, H. P. WEBB, JOHN PALM, L. LARSON, TOM GUNNESS and S. S. GLARUM,

Defendants.

WILLIAM SHILLABER,

Complainant,

vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, GEORGE T. SIMPSON (substituted for Edward T. Young), IRA B. MILLS, CHARLES F. STAPLES and CHARLES E. ELMQUIST (substituted for William E. Young),

Defendants.

(Consolidated.)

INDEX

Index page numbers refer to pages of original report as indicated upon margin herein.

		Page
I.	INTRODUCTORY	2
II.	LEGISLATION AND MATTERS DIRECTLY PERTAINING THERETO	6
	Brief summary thereof....p. 16	
III.	AUTHORITY OF COMMISSION TO MAKE SCHEDULE OF RATES	17
IV.	EFFECT OF PRESCRIBED RATES IF CONFISCATORY AS TO ONE LINE OF RAILWAY AND NOT ANOTHER	19
V.	INTERFERENCE WITH INTERSTATE COMMERCE	20
VI.	VALUATIONS OF PROPERTY DEVOTED TO PUBLIC SERVICE	62
VII.	REAL ESTATE VALUATIONS AS OF JUNE 30, 1908	67
	Summary of Valuations of Physical Properties Itemized:	
	Northern Pacific Case....p. 91	
	Great Northern Case....p. 93	
	Minneapolis & St. Louis Case....p. 95	
VIII.	DEPRECIATION	96
IX.	STOCKS AND BONDS AS AFFECTING VALUE	98
X.	ORIGINAL COST OF CONSTRUCTION	100
XI.	ROADS CONSTRUCTED AND MAINTAINED PURSUANT TO PUBLIC DEMAND	107
XII.	ECONOMY OF MANAGEMENT	108
XIII.	VALUATIONS OF ENTIRE SYSTEM	110

Page

XIV. Division of Property Valuation Between Freight and Passenger Business, State and Interstate 112

Northern Pacific Case....p. 114

Summary of apportionment of total value to the different classes of business in Minnesota, p. 116

Great Northern Case....p. 116

Summary of apportionment of total value to the different classes of business....p. 118

Minneapolis & St. Louis Case. N. B.—See infra XVII, p. 127 (158 to 169), where it is considered separately.

XV. Reasonable Return.... 119

XVI. Net Revenue Derived from Freight and Passenger Business, Respectively.... 122

XVII. Net Return from Intrastate Passenger and Freight Business of Property Valuations Assigned to Each Respectively.

Northern Pacific Case
Great Northern case } 127–133

Northern Pacific Case.

Net revenue derived from freight business and passenger business respectively—gross earnings....p. 134

Division freight earnings between intrastate and interstate....p. 134

Division passenger earnings between intrastate and interstate....p. 135

Operating expenses....p. 136

Division between freight and passenger..p. 136
Division between intrastate and interstate....p. 136

Division of total passenger operating expenses between intrastate passenger and interstate passenger....p. 139

Page

Apportionment of taxes to various classes of business.....p. 141

Apportionment of other income to various classes of business on the gross earnings basis..p. 141

Net income applicable to return upon valuation of property apportioned to the various classes of business.....p. 142

Table—Results in Northern Pacific Case..p. 143

(Note 1, p. 144.)

Great Northern Case.

Net revenue derived from freight business and passenger business.....p. 145

Gross earnings.....p. 145

Division of freight earnings between intrastate and interstate.....p. 146

Division of passenger earnings between intrastate and interstate.....p. 146

Operating expenses.....p. 147

Division between freight and passenger..p. 147

Division of freight operating expenses between interstate and intrastate.....p. 147

Division of total passenger operating expenses between intrastate and interstate passenger.....p. 149

Apportionment of taxes to various classes of business.....p. 150

Apportionment of other income to various classes of business on gross earnings basis.....p. 150

Net income applicable to return upon valuation of property apportioned to the various classes of business.....p. 151

Table—Results in Great Northern Case..p. 153

(Notes 1-4, pp. 154-157.)

Page

Minneapolis & St. Louis Case.....pp. 158-169

Apportionment of value between freight and passenger business and between intrastate and interstate business of each.....p. 158

Summary of apportionment of total value to the different classes of business in Minnesota.....p. 159

Net earnings—entire system.....p. 161

Net earnings—Minnesota.....p. 161

Interest charges.....p. 162

Effect of rates complained of upon revenue—merchandise rates.....p. 162

Passenger business.....p. 162

Commodities, Chapter 232.....p. 163

Revenue derived from operation, fiscal year ending June 30, 1907.....p. 165

XVIII. EXPRESS BUSINESS..... 169

XIX. CONCLUSION..... 171

Decree—Northern Pacific Case.....173–176

Decree—Great Northern Case.....177–180

Decree—Minneapolis & St. Louis Case.....181–184

To the Honorable, the Judges of the Circuit Court of the United States for the District of Minnesota, Third Division, sitting in equity: *2

Now comes Charles E. Otis, by an order of Hon. Walter H. Sanborn, one of the Judges of said Court, made and filed with the Clerk thereof, in each of the above entitled suits, on the 4th day of May, A. D., 1908, appointed Special Master in Chancery, in said suits, respectively with power and direction to take and report to the Court the evidence therein, to examine such evidence, make all necessary computations, find and state the facts so found and the results of such computations, and recommend to the Court a form of a proper decree in each of said several suits, and respectfully reports:

I.

INTRODUCTORY.

Having first taken and filed with the Clerk of Court his oath of office in each of said suits, the Master summoned the respective parties before him on the 20th day of May, 1908, for the consideration of the matters to him referred and at the time so appointed it was arranged that Complainants should commence their offer of testimony on the 2nd day of June 1908, and proceed with the same with all convenient speed.

By orders simultaneously made and filed and of like tenor and effect there were, in like manner, so referred to the Master nine several suits, consisting of the three above entitled and six others of the same general nature which at about the same time had been instituted by stockholders of railroad companies doing business in Minnesota as complainants against the respective companies of which the respective complainants were stockhold- *3

ers, the Attorney General of the state of Minnesota and the members of the Railroad & Warehouse Commission of Minnesota as defendants, in all of which the solicitors and counsel were substantially the same. The grievances complained of were of the same general nature and all sought the same relief. Because the issues were identical or closely related, the determination of which would have, as to many of them, a like result in each case, it was arranged that the evidence submitted in any one of the cases in which testimony should be offered should, so far as applicable, material and relevant to the issues in any of the other cases, be received and considered as evidence in each of the cases. For the same reason, and because the several suits have been tried and submitted together, it has seemed to the Master that he should make and file in each suit in which evidence was offered a report identical in form but so broad as to cover all the matters relative and pertinent to each thereof and that thus the Court would be materially assisted in reaching its determination in the several causes.

For convenience, the suit against the Northern Pacific Railway Company and others will be referred to as the Northern Pacific case, the suit against the Great Northern Railway Company and others will be referred to as the Great Northern case and the suit against the Minneapolis & St. Louis Railroad Co. and others as the Minneapolis & St. Louis case.

According to arrangements so made, the taking of testimony was begun and diligently proceeded with, Mr. George N. Hill-
*4 man, appointed by the Court for the purpose as reporter, taking down the evidence, in the presence of the Master, and transcribing the same, as directed by order of reference, thus making and preserving a full record of the testimony and of all matters and proceedings from time to time had and taken before the Master, all of which, properly certified by the reporter as being full, true and correct, is herewith presented to the

Court and filed with the Clerk thereof, to be preserved as a record in each of the suits.

It soon became manifest that it would be impossible to take the evidence within the time limited in said orders by the Court, much of it being statistical and historical in character, covering a long period of years and consisting of many and voluminous tables of figures contained in exhibits requiring careful preparation and the examination of many books of account and records for their proper presentation as testimony in court and for purposes of cross-examination. It was, therefore, eventually arranged that of the nine cases so referred to the Master evidence in three thereof should first be taken and considered by the Master and reported to the Court, and to this end the suits above entitled were selected and it was mutually agreed that the other six suits so referred should rest in abeyance until those selected should have been duly reported to the Court and by it finally determined.

It was further arranged that the taking of evidence in these three cases should be proceeded with as diligently as practicable, alternating as should be most convenient and best facilitate the progress thereof, and without following any fixed order of proof, either on the part of the complainants or defendants, and that the limit as to time for taking testimony fixed by the orders of Court should be considered as removed without making application to the Court therefor, save that the same should be proceeded with diligently and without unnecessary delay. *5

The taking of testimony in the three above selected cases was not finally closed until May 26, 1910, and final submission to the Master was made on the 29th day of July, 1910.

In the Northern Pacific suit the Complainant Charles E. Perkins has died and by order of Court the suit has been continued in the name of David C. Shepard, the surviving com-

plainant, and by him an amended and supplemental bill of complaint was filed.

The suit of Henry A. James against the Great Northern Railway Company and others has been consolidated with the suit of John S. Kennedy and Henry F. Dimock against the same defendants, and by these complainants an amended bill of complaint has been filed. Said John S. Kennedy has died, his death has been suggested to the Court and the executors of his will have been substituted as parties complainant in his place.

The terms of office of defendant Edward T. Young as Attorney General and of defendant William E. Young as a member of the Railroad & Warehouse Commission having expired, an order has been duly entered by the Court substituting in each of the three cases as parties defendant George T. Simpson, who has been elected Attorney General of the state of Minnesota to succeed said Edward T. Young and Charles E. Elmquist, who has been elected a member of the Railroad & Warehouse Commission of the state of Minnesota to succeed said William E. Young.

The Attorney General and the members of the State Railroad
*6 & Warehouse Commission have filed answers to the bills and supplemental bills in all of the above entitled causes. No answer has been interposed by the defendant railroad companies.

The defendants other than the railroad companies, the Attorney General and the members of the Railroad & Warehouse Commission, in the Northern Pacific and Great Northern cases are all citizens of Minnesota and engaged in the business of receiving and shipping freight over the lines of the defendant railroad companies in said state and make use thereof for passenger transportation, and are made defendants as representatives of and to protect the rights of a large class of shippers and passengers, so numerous that it was impracticable to make all of them parties defendant. No answers have been interposed by them or on their behalf save that their rights are fully protected by the answering defendants.

II.

LEGISLATION AND MATTERS DIRECTLY PERTAINING THERETO.

By Chapter 28 of the Revised Laws of Minnesota 1905, being legislation originally enacted in 1887 as amended in 1901, the general supervision of railroad and express companies doing business in the state of Minnesota as common carriers, and all public warehouses, is vested in a board of three members known as Railroad & Warehouse Commission, with power to adjust and fix rates and prescribe rules and regulations for the conduct of the business of such companies, and fines and penalties are by said act prescribed for failure to comply therewith. The here material sections of said act are as follows:

"1969. Complaint that rate is unreasonable—Duty of commission—Upon the verified complaint of any person or of any corporation, private or municipal, that any tariff *7
of rates, fares or charges, or any part thereof, or of any classification is unequal or unreasonable, the commission shall proceed to investigate the matters alleged in such complaint, and for the purposes of such investigation they may require the attendance of witnesses and the production of books, papers and documents. If, upon the hearing, such tariff of rates, fares, or charges, or any part thereof, or of such classification, is found to be unequal or unreasonable, the commission shall make an order stating wherein the same are so unequal or unreasonable, and shall make a tariff of rates, fares, charges and classification which shall be substituted for the tariff so complained of. The tariff so made by the commission shall be deemed prima facie reasonable in all courts and shall be in full force during the pendency of any appeal or other proceedings to review the action of the commission in establishing the same.

"1970. Investigation without complaint—The commission shall also of its own motion investigate any matter

relating to the management by any such carrier or warehouseman of its business or the reasonableness of any rates, fares, charges, or classifications, whenever, in its judgment, the public interests require it, and in such case the procedure shall be, as nearly as may be, as provided upon the filing of a complaint, and the findings and order in such case shall have the same effect as those made upon complaint."

During the 1905 legislative session of Minnesota, a joint resolution of the House and Senate was passed, approved April 14, 1905 (Session Laws of 1905, Chap. 350), directing the Railroad & Warehouse Commission "to undertake the work of securing a readjustment of the existing freight rates in this state which will give a more uniform system of rates throughout the state and a uniform scale of percentages which each class rate shall bear to the first class, the re-adjustment to secure a substantial reduction in the existing merchandise rates." At the same time funds were provided to enable the Commission to secure a physical valuation of all the railroad properties within the state.

At the same session of the legislature, by Chapter 176 of the laws of that year, railroad companies within the state were prohibited from changing any state rate except upon application to the Commission and its consent obtained. Theretofore it had been the practice of such carriers to increase or reduce their
*8 rates at will without previous notice and free from governmental control.

Prior to such legislation the Commission had been diligent in supervising and regulating the methods of business of such carriers with reference to the furnishing of cars, adjusting minimum carload weights, equalizing as far as practicable rates between localities and between shippers so as to prevent unjust discrimination between such localities and between individual shippers in the same localities, securing reasonable rates and

switching charges in particular cases, and supervising like matters arising between shippers and carriers, most of which were usually adjusted by mutual concessions and compromises without formal investigation or order.

With reference to the matter of rates complaints were almost invariably based on one of two claims, either that somebody in the same or in a nearby town was getting a better rate or that the rate to some particular town was unreasonably high as compared with the rate to some other town on the same or some other line of road with reference to the relative mileage, and such complaints were usually confined to some particular commodity.

Alleged discrimination between localities and shippers, not excessive rates, was, with respect to tariffs, substantially the only ground of complaint.

Through the active interposition of the State Commission reductions and readjustments throughout the state on all railroads were secured in rates upon grain, coal, lumber and livestock in both state and interstate traffic. The Commission had not, however, undertaken to prescribe general schedules or tariffs covering all articles and commodities.

After the legislation of 1905, and pursuant thereto, the Commission made an extended investigation of the so-called merchandise rates charged by all railroad companies throughout the state doing business therein for the transportation of freight merchandise between points in Minnesota without, however, making a physical valuation of the properties employed in such service, and made up and completed full schedules of rates covering all merchandise transportations and notified such railroad companies to show cause why such schedule should not be promulgated as a maximum schedule of rates for all said railroads between points within the state. *9

Pursuant to such notice public hearings were had before the Commission, extending over a period of several months, in which

the railroad companies appeared and took an active part and submitted a large amount of testimony with reference to the matters under consideration, sufficient in the opinion of the Commission to enable it to act intelligently in the premises, and thereupon, on September 6, 1906, it made and served an order on all of said railroad companies, to take effect November 15, 1906, a true and correct copy whereof is annexed to and made part of the bills of complaint in these cases.

Thereafter, on May 3, 1907, said Commission in like manner made and served on all the defendant railroad companies an order supplemental to said order of September 6, 1906, a copy of which is annexed to the bills of complaint herein and made part thereof, and was made for the purpose of securing more favorable in-rates to a number of jobbing centers other than the eastern terminals of St. Paul, Minneapolis and Duluth, and was so made pursuant to a provision of the order of September 6, 1906, in the form of a note thereto to the effect that such action would be taken if further satisfactory adjustments should not be made by the railroad companies.

*10 The volume of business and increased facilities for handling the same at certain large and important stations called terminal or distributing stations substantially reduced the cost of transportation to and from such points and justifies preferential rates in favor of the patrons thereof—a condition recognized by the Commission's orders. Such rates are known as distributive or terminal rates and are the rates specifically named in the schedules of rates which form a part of said orders.

Rates upon shipments between points neither of which are terminal or distributive stations are known as distance tariff rates and are the same as terminal rates for like distances with five per cent added.

By the Western Classification, so-called, and to which reference is made in said orders, substantially all commodities and property which are the subject of transportation are classified

and arranged in groups with reference to their general character and value and the cost of transportation thereof, and such classification, with modifications from time to time made therein, has long been used by common carriers in the West and Northwest as a basis for fixing rates, the commodities of each class taking the same rate under like conditions. In Minnesota, however, a large number of commodities, amounting to several hundred, have, by the intervention of the Commission, been removed from such Western Classification and given special rates known as "commodity rates" or reduced in class so that the Western Classification in operation in Minnesota is very materially different in many respects from the Western Classification in general use as a basis of rates in other states.

The schedule of rates set forth in the order of September 6th *11
was such that each rate for each class for any distance bore such an exact relation to each other rate that, given one rate out of the schedule, any other rate could be ascertained by mathematical calculation and without reference to the schedule itself. The plan of the schedule is this:

For first-class merchandise an allowance of 11.02 cents per cwt. is made for terminal charges and for each five miles or fraction thereof up to 200 miles, .98 of a cent for hauling charge; so that for a distance of five miles the rate is 12 cents per cwt., for a distance of ten miles the rate is 12.98 cents per cwt. and for a distance of 200 miles the rate is 50.22 cents per cwt. After a distance of 200 miles is reached .98 of a cent is allowed per cwt. as a hauling charge for each ten miles or fraction thereof up to 400 miles; so that the rate for 200 miles being 50.22 cents per cwt. the rate for 210 miles is 51.20 cents, for 220 miles the rate is 52.18 cents and for 400 miles the rate is 69.82 cents per cwt. After a distance of 400 miles is reached .98 of a cent is allowed as a hauling charge per cwt. for each 20 miles or fraction thereof up to 500 miles; so that the rate for 400

miles being 69.82 cents per cwt. the rate for 420 miles is 70.80 cents and the rate for 500 miles is 74.72 cents per cwt.

The rates for classes other than the first class are a fixed per centum of the corresponding rates for the first class, those for the second class being 83 1-3 per cent, of the third class being 66 2-3 per cent, of the fourth class being 50 per cent, of the fifth class being 40 per cent, of Class A being 45 per cent, of Class B being 35 per cent, of Class C being 30 per cent, of Class D being 25 per cent and of Class E being 20 per cent.

*12 The rates prescribed are maximum terminal rates and may be increased by five per centum for shipments between stations neither of which is a terminal or distributing station.

It appears from the evidence that the rates so prescribed for the first four classes apply alike to merchandise shipments in carload or in less than carload lots, but as to all the other classes they apply only to shipments in carload lots.

The reduction in merchandise rates made by the order of September 6, 1906, was from 20 per cent to 25 per cent, but notwithstanding the extent of the reduction all the railway companies interested put the rates prescribed by the order into effect on the 15th of November, 1906, and they ever since have been and still are maintained by all the companies concerned as maximum rates for the transportation within the state of merchandise covered by the order.

The same is also true with reference to the rates prescribed in the Commission's supplemental order of May 3, 1907, from and since its issuance, which supplemental order, in the Northern Pacific case, effected a reduction of 13.577 per cent in the rates upon the traffic affected by it. To what extent it affected traffic rates in the Great Northern case does not appear. In the Minneapolis & St. Louis case no relief is asked on account of it.

At the same time that the Commission was considering the schedule afterwards incorporated in its order of September 6, 1906, it was also considering a reduction in rates for trans-

portation within the state of commodities in carload lots not covered by the order. Because of the agitation with regard to commodity rates, the three northern systems in the state, the Great Northern, the Northern Pacific and the Minneapolis, St. *13
Paul and Sault Ste. Marie companies, voluntarily reduced their rates on grain approximately ten per cent by filing schedules effective September 1, 1906, and their rates on hard and soft coal at least ten per cent by filing schedules effective October 22, 1906.

Notwithstanding these voluntary reductions and the reductions caused by the order of September 6, 1906, the Commission under date December 14, 1906, effective by its terms January 26, 1907, made its second order reducing rates for transportation within the state of grain, coal, lumber and livestock. The reduction effected averaged from 10 per cent to 28½ per cent or a general average of 17.37 per cent in addition to the voluntary reductions in rates on grain and coal made by the three northern systems as above recited.

In January, 1907, the railroad companies affected by this second order, being all that are parties defendant to the nine pending suits as above set forth, procured an injunction from the Circuit Court of the United States for the District of Minnesota forbidding the enforcement by the Commission of its second order. Thereupon the legislature of the state, which convened early in January, 1907, enacted Chapter 232, General Laws of Minnesota for the year 1907, approved April 18, 1907, and effective by its terms June 1, 1907, fixing a new schedule of commodity rates in all respects like the schedule comprehended in the second order of the Commission excepting that the reduction in rates provided by it was 10 per cent less than that provided by the order—a copy of which legislative enactment is annexed as an exhibit to the bills of complaint, respectively.

By Chapter 232 the legislature creates seven new classes, *14

numbered respectively from 11 to 17. Wheat and thirteen other articles are placed in Class 11, corn and thirty-seven other articles in Class 12, lumber and five other articles in Class 13, sheep in double-decked cars and cattle in Class 14, sheep in single-decked cars and hogs in Class 15, hard coal in Class 16, and soft coal in Class 17. There is no fixed percentage relation between the classes and no regular rate of progression of the various rates with increasing distance. In other respects, however, the method of making the schedules is similar to that adopted by the Commission in its order of September 6, 1906. The hauling charge comprehended in the rates for each class decreases with increasing distance and becomes very small for the added mileage for distances between 300 and 400 miles, which is the limit of distance covered by the Act. On Class 11 the difference between the rate for 300 miles and that for 400 miles is 1.1 cents per cwt. amounting to 2.2 mills per ton per mile; on Class 12 the difference is one cent per cwt. or two mills per ton per mile; on Class 13 it is 2.2 cents per cwt. or 4.4 mills per ton per mile; on Class 14 it is 2.2 cents per cwt. or 4.4 mills per ton per mile; on Class 15 it is 1.5 cents per cwt. or three mills per ton per mile; on Class 16 it is 34 cents per ton or 3.4 mills per ton per mile; and on Class 17 it is 18 cents per ton or 1.8 mills per ton per mile.

The schedule of rates only applies to shipments in carload lots with minimum weights definitely fixed by the Act.

Meantime and at the same session of the legislature it had passed the so-called two cents passenger law, being an Act approved April 4, 1907, effective by its terms May 1, 1907, prescribing as maximum rates for the transportation of passengers
*15 within the state two cents per mile for passengers of twelve years of age or over together with baggage not exceeding 150 pounds in weight, and one cent per mile for passengers under twelve years of age together with baggage not exceeding 75 pounds in weight. The maximum theretofore had been three

cents for adult passengers and 1½ cents for persons under twelve years of age.

The defendant railway companies published and put into effect the passenger rates prescribed by said Act on April 4, 1907, and were about to put into effect the commodity rates prescribed by said Act of April 18, 1907, and would have done so had they not been restrained by the writs of injunction issued in these suits. They were apparently influenced in what they did and were about to do both with respect to the Commission's orders and the Acts of the legislature by the severe penalties denounced by the statutes, which, until their invalidity in this respect was judicially determined, as has since occurred, they feared might impose upon the officers thereof heavy fines and long imprisonments.

If said railway companies had refused to obey the orders of the Commission and the acts of the legislature aforesaid, or ceased to obey the same or either thereof, said Attorney General and said Commission were intending to take, and would have instituted proceedings, by mandamus or otherwise, against them and each of them and their respective officers and agents, to enforce obedience to said acts and orders, and said proceedings would have been so taken but for the injunctional orders issued herein.

Before the suits were brought the complainants in each of said cases demanded of the president and directors of the railroad companies of which they were respectively stockholders *16
that they, said president and directors, cease obedience to and that they refuse to obey said respective orders and acts and each of them and that they forthwith institute proper legal proceedings to test the legality thereof. Said respective railway companies and said officers and agents thereof, respectively, refused compliance with said demands because of the aforesaid extreme fines and penalties denounced by the statutes in case

such statutes should be held legal and operative as punishments for disobedience to said acts and orders.

It has been established by proper and sufficient proofs that complainants were qualified to bring these respective suits and that the Court has jurisdiction of the parties and of the subject matter thereof and that said suits are not nor are either or any of them in any manner or to any extent collusive to confer on the Court of the United States jurisdiction of a case or cases of which it could not otherwise have jurisdiction.

Summarized, the reductions in rates which may be charged by railroad companies for interstate transportation within the state of Minnesota so made by its legislature and commission and challenged by these suits are briefly as follows:

1. Reduction in rates on general merchandise amounting to from 20 per cent to 25 per cent. (Commission's order of September 6, 1906.)

2. Reduction in maximum rates on passengers amounting to 33 1-3 per cent. (Session Laws of 1907, Chap. 176.)

3. Reduction in rates on grain, lumber, live stock and coal amounting to 7.37 per cent. (Session Laws of 1907, Chap. 232.)

4. Reduction in in-rates in distributing stations amounting, in the Northern Pacific case, to 13.58 per cent. (Commission's order of May 3, 1907.)

*17

III.

AUTHORITY OF COMMISSION TO MAKE SCHEDULE OF RATES.

It is earnestly insisted by complainants that the legislature has never conferred upon the Commission authority to make the orders complained of and that the railroad companies were under no legal compulsion to adopt the rates prescribed by them. It is claimed that the extent of the Commission's power

was to investigate and readjust particular rates upon complaint or its own motion on notice to the railroad companies to be affected, the investigation to be limited to the matter complained of, but that it was without authority to make general and comprehensive schedules of rates covering all classes of merchandise and commodities upon all railroads and between all points in the state, and the case of *Siler v. Louisville & Nashville Railroad Company,* 213 U. S. 175, is confidently relied upon to support this position.

Were it not for the joint resolution of the legislature of April 6, 1905, before referred to, the case cited would seem to support complainants' contention. While it is conceded that such resolution has the force of law, they insist, however, that it authorizes the Commission only "to undertake the work of securing a readjustment of the existing freight rates in this state which will give a more uniform system of rates throughout the state and a uniform schedule of percentage which each class rate shall bear to the first class, the readjustment to secure a substantial reduction in the existing merchandise rates," and that this resolution simply contemplates the preparation of rate schedules in furtherance of the desired end therein expressed to be thereafter put in force by legislative enactment. *18

Authority to undertake a work without words of limitation includes the prosecution thereof until completion, and especially so in view of the language here used designating just what such work is to effect. The resolution clearly takes the case out of the operation of the law as declared in the case above cited.

It does not seem here material, however, aside from the question of interference, hereafter to be considered, whether the orders complained of are void or valid, provided the rates thereby prescribed are in fact just and reasonable. They have been actually adopted and regardless of the influences which may have led to their adoption, if they are reasonable in fact the complainants would have no standing in a court of equity in

attempting to compel a return to excessive rates. If there had been no allegations in the bill that the merchandise rates prescribed by the Commission and put in by the railroad companies were unreasonable and confiscatory, it seems clear that as to such rates no case would be stated calling for the intervention of a court of equity. If put in with authority of the state legislature, as is here held, but are in contravention of the commerce clause of the Constitution or the Act of Congress and therefore unlawfully discriminate against interstate commerce, it is doubtless competent for the Court to adjudge their invalidity and compel the defendant company to return to its former rates or to such rates as shall prevent such discrimination—a matter to be hereafter determined. The cases of *Missouri, Kansas & Texas Railway Company, et al., v. Love*, 177 Fed. Rep. 493, and *In re Arkansas Railway Rates*, 163 Federal Reporter 141, suggest the propriety of such course.

*19

IV.

EFFECT OF PRESCRIBED RATES IF CONFISCATORY AS TO ONE LINE OF RAILWAY AND NOT ANOTHER.

It has also been urged that if the prescribed rates or any of them are confiscatory as to any of the railroad companies it operates to invalidate such rates even as to those companies which would through them secure a reasonable return on their investment.

This contention was raised and denied in the Missouri rate case and should be followed regardless of the Master's views. He believes, however, that the question was there correctly decided. Whether invalid provisions in a law shall operate to invalidate the whole law turns upon the question as to whether the legislators would have enacted the law without such invalid provisions, or, in other words, whether the invalid provisions

were a consideration for and influenced their action. If the legislators would probably not have acted at all if the invalid features of the law had been first eliminated, then the whole law falls, otherwise not. If, in the legislation here under consideration, a provision had been inserted that the same should not be operative as to any railroad company whenever the effect thereof would confiscate the property of such company, its validity could not be questioned on such ground. In view of the end sought, there can be no doubt that the insertion of the provision suggested, if deemed necessary for its validity, would have had no influence in preventing legislation in such form. The fact that the legislation would not be applicable to all cases within its terms would not for a moment have deterred the legis- *20
lature in its action along the lines taken by it. This objection must be overruled.

V.

INTERFERENCE WITH INTERSTATE COMMERCE.

A question of first importance is raised by the complainants in their contention that the prescribed rates discriminate against and operate as a regulation of interstate commerce, and a large amount of testimony has been offered by them bearing upon this phase of the cases. In their view upon the question so raised it is wholly immaterial whether the prescribed rates are reasonable or not. They contend that State-made rates must be made to conform to and not be relatively less than or unduly discriminate against interstate rates, and that the reasonableness of such interstate rates must be determined in the first instance by Congress or its administrative officers, the Interstate Commerce Commission, acting under the Interstate Commerce Statute.

The orders of the Minnesota Commission and acts of the leg-

islature are strictly limited to state commerce, so far as the language used is concerned, and in terms have no reference to commerce without the state, nor do they apparently seek to control interstate rates. It has been held, however, that "If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid whatever may have been the purpose for
*21 which it was enacted, and although the company may do both state and interstate business. Such is an established rule of constitutional construction, as the adjudged cases abundantly show." (*Telegraph Co. v. Kansas,* 216 U. S. 1.)

It must be true that there cannot be a dual control in so important a regulation as the fixing of rates, the same being of vital importance to the continued existence of the company as a going concern, and if state and interstate rates must bear a certain relation to each other, the standard must be fixed by the sovereign power, the Congress, which under the Constitution is given power to regulate commerce among the states. A power enumerated in the Constitution, with all the incidents thereof, is supreme and cannot be in any manner limited by state action. Subject to such power, so conceded to Congress, all rights are reserved to the State, including the right to regulate its internal commerce. "It needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation." (*Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 196.)

"It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what

is done amounts to a regulation of foreign or interstate commerce." (*Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307.)

In *Ames v. Union Pacific R. R. Co.* (64 Fed. Rep., p. 172), *22 where this question seems to have been raised by counsel for the defendant, Mr. Justice Brewer said:

"Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true the companies may, for their own convenience, to secure business, or for any other reason, rearrange their interstate rates, and make them conform to the local rates prescribed by the Statute, but surely there is no legal compulsion. The Statute of the State does not work a change in interstate rates, any more than an Act of Congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effects of competition between themselves and other companies, in restraint of the otherwise undeniable power of the State."

On appeal, this statement of the law, not in form but in effect, is approved by Mr. Justice Harlan.

The matter of discrimination, in the instant cases made so prominent, does not seem to have been called to the attention of the Court, nor does there seem to have been any evidence in the case bearing upon the question. Here the complainants do not claim that "as a matter of law" local rates necessarily interfere with interstate rates or that companies can "plead their own convenience or the effect of competition between themselves and other companies in restraint of the otherwise undeniable power of the State." What they do insist is that the evidence presented in these cases differentiates them from the Ames case and shows that the prescribed rates if observed are so far-reaching in their effect as to compel disobedience to the inhibitions of the Interstate Commerce Act against discrimination, which in terms forbids a carrier "to subject any particular *23 * * * locality * * * to any undue or unreasonable

prejudice or disadvantage in any respect whatsoever," and that such discrimination, enforced as it is by state action, if not denounced by the Act of Congress, is violative of the commerce clause of the Constitution, having in mind the purposes of such provision and the historical conditions giving rise to its adoption.

The State claims that the above section of the Federal Act referred to does not prohibit discrimination brought about in conducting state commerce because of the proviso appended to the first section of the act, as follows: "Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, storage or handling of property wholly within one state and not shipped to or from a foreign country or to any state or territory, as aforesaid."

This would seem to be in effect a declaration that the act is not intended to apply to any subject outside of Federal control. The primary purpose of the act, as has been repeatedly held, is to prevent discrimination, and it would seem to be a misconstruction of the proviso to hold that it authorized or permitted in its most vicious form that which in another form it so strictly inhibits, especially in view of the fact that there can be no question of the competency of Congress to prevent dis-
*24 crimination between interstate localities. It certainly should not be construed as conferring upon a state power or permission to so regulate commerce within its borders as to hamper or be a burden upon interstate commerce and operate as an unrighteous discrimination against localities in other states. It was such discrimination which gave rise to the commerce clause of the Constitution and it is not to be supposed that Congress intended to give the carrier, or the State acting upon it, a free hand with respect to state commerce without regard to its effect upon commerce between the states. It could not do so if it would. A state has no right to burden interstate commerce for

the benefit of its own business enterprises or to subject it to "any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

"It is of the last importance that the freedom of interstate commerce shall not be trammeled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general rights of the states to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the general government and not in hostility to rights secured by the supreme law of the land." (*Western Union Telegraph Co. v. Kansas,* 216 U. S.)

That such burden may be imposed by state rate regulation is well illustrated in the case of *Saunders & Company v. Southern Express Company,* decided by the Interstate Commerce Commission January 10, 1910, (Opinion No. 1278), where the facts showed that certain state rates put in by the Alabama Railroad Commission under legislative authority discriminated directly and substantially in favor of the City of Mobile, Alabama, against the City of Pensacola, Florida. In delivering its opinion the Commission says: *25

> "The carriage of traffic by a common carrier for one community or one set of shippers at less than it carries the same traffic for a like distance, and under substantially similar transportation conditions, for another community or another set of shippers is not only in contravention of fundamental right and justice but is essentially iniquitous. If such a discrimination is practiced by a common carrier as between communities or different sets of shippers within the same state and on traffic moving only within the state, redress may usually be had under the state laws. On the other hand, if an interstate carrier is guilty of such a discrimination with respect to interstate traffic, redress may

be had under the act to regulate commerce. But when a carrier, as in this case, serves two communities similarly situated, by hauling the same traffic under similar conditions from a point of origin to destinations in the same state and also to the same destinations from an interstate point of origin, it is not altogether clear that existing legislation affords redress against a discrimination, as between the two points, when resulting from an order by the state commission. But unless some such power is lodged somewhere under appropriate legislation, it is evident that State-made rates, if established in pursuance of a narrow or selfish local policy, may not only hinder and harm and burden interstate traffic and interstate interests, but may, if adjusted with that end in view, take from a point in another state a business that naturally belongs to that point or in which it is entitled at least to participate, on the basis of equal rates and equal opportunity. * * *

"The defendant is one concern and one instrument of commerce operating through and across those invisible lines that separate the several states from one another. It has but one corps of officers and employees and but one equipment. Its only object is to serve all the shippers in the territory through which it passes. That object is legitimately effected only when it serves its whole constituent public upon substantially similar terms when the conditions are substantially similar. If it voluntarily makes a distinction between traffic that moves from a point in one state to a point in another state and traffic that moves between points in the same state, and gives to the state traffic
*26 lower rates than to the interstate traffic moving under substantially similar conditions, it imposes upon the latter a burden that it ought not justly to bear, and it discriminates against one community in favor of another. The same burden and discrimination follow if instead of voluntarily so adjusting its rates it is compelled so to adjust them by the action of a state commission. It may be that this anomaly in transportation necessarily results from our dual system of government and that a remedy is beyond reach without some amendment to the national constitution. On principle it is clear that a carrier operating through two or more

states is but one vehicle of commerce, and all traffic moved by it, whether state or interstate, ought, when the general transportation conditions are the same, to bear its just proportion of the cost of operation and ought to yield no more and no less than its just proportion of the revenues of the carrier. Any other theory is fundamentally inequitable, illogical and unreasonable. It may be, but on that point we express no opinion, that the Congress may constitutionally protect interstate commerce, as well as the carriers that are engaged in interstate transportation, by requiring that any state traffic moved by such a carrier shall bear its just proportion of the cost of operation and yield its proper proportion of profit to the carrier; and that with such an end in view it may authorize this Commission to fix minimum rates, at least, for state traffic when moved by carriers engaged also in interstate transportation; or that it may provide that no carrier engaged in the interstate transportation of passengers or property may at the same time carry state traffic at rates that are less than the rates exacted by it for interstate carriage of like distance and under like transportation conditions. It has, however, not attempted any such legislation, and whether such an enactment would stand the test of scrutiny by the courts under the constitution as it now stands, and if so, whether it would be desirable from the standpoint of a broad public policy, are questions that must ultimately be determined by the legislative power and therefore cannot profitably be discussed by the Commission in this proceeding."

The Commission were of opinion that the Federal law under which they derived their power did not justify them in interfering with the State-made rates although they found that they operated as a burden upon interstate traffic. In view of this finding it would seem to have been competent for the Commission to require the carrier to ignore the order of the State Commission on the ground that in its operation it violated the commerce clause of the Constitution. In a matter of so much doubt, however, it was a proper exercise of administrative discretion

not to compel the carrier to disregard the State-made rate until
*27 its validity and their own power in the premises had been judicially determined, and especially is this true in view of the fact that in that case the State was not represented and the action of its commission would have been condemned without a hearing on the part of the State. In the cases before the Master, the validity of the prescribed rates is directly in question, not merely as a matter of legal construction, but upon voluminous evidence, with all interested parties present, and the force and effect of the Federal Act and of the commerce clause can be determined in the light of the facts disclosed by such evidence. The facts in this regard are as follows:

1. The Northern Pacific Railway Company is a corporation and is a common carrier owning, maintaining and operating lines of railway exclusive of lines in Manitoba and its interest in the Spokane, Portland & Seattle railroad comprehending on the 30th day of June, 1908, approximately 7,695.80 miles of track, of which 1,625.20 miles are in Minnesota. Its main line of railway extends from Superior, Wisconsin, and Duluth, Minnesota, which are situated side by side at the westerly end of Lake Superior, and from the cities of St. Paul and Minneapolis, Minnesota, in a westerly direction through the states of Minnesota, North Dakota, Montana, Idaho, Washington and Oregon to the cities of Seattle, Tacoma and Portland on the Pacific coast. Between Duluth and other points in Minnesota reached by it the company has both a local and an interstate line of railway, the interstate line passing through Wisconsin and joining the state line at Carlton, Minnesota, twenty miles westerly from Duluth. The Company has a branch line which leaves the main line at Manitoba Junction, 225 miles westerly from
*28 St. Paul, and extends in a northerly direction, leaving the state of Minnesota at East Grand Forks, Minnesota, 320 miles from St. Paul and entering the state of North Dakota at Grand Forks, North Dakota, which is at the same official distance from

St. Paul, and running to Pembina, North Dakota, which is on the border line between North Dakota and Manitoba and is 414 miles from St. Paul. It has another branch line which leaves the main line at Wadena, Minnesota, 160 miles westerly from St. Paul, and extends in a westerly direction, leaving the state of Minnesota at Breckenridge, Minnesota, 237 miles from St. Paul, and entering the state of North Dakota at Wahpeton, North Dakota, 238 miles from St. Paul, and running thence to Oakes, North Dakota, 311 miles from St. Paul. The main line of the company leaves the state of Minnesota at Moorhead, Minnesota, 250 miles from St. Paul, and enters the state of North Dakota at Fargo, North Dakota, which is 251 miles from St. Paul.

2. The Great Northern Railway Company is a corporation and is a common carrier owning, maintaining and operating lines of railway comprehending on the 30th day of June, 1908, 8,528.98 miles of track, of which 2,779.30 miles are in Minnesota. Its main lines of railway extend from Superior, Wisconsin, and Duluth, Minnesota, in a westerly direction through the states of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington and Oregon to the cities of Seattle and Portland. Its line between Duluth, Minnesota, and other points in Minnesota reached by it passes through the state of Wisconsin. Between Minneapolis and Larimore, North Dakota, the Company has two main lines of Railway. One of these lines extends from Minneapolis by way of Willmar, Minnesota, leaving the state of Minnesota at Breckenridge, Minnesota, 214 miles from St. Paul, and entering the state of North Dakota at Wahpeton, North Dakota, 215 miles from St. Paul, and running thence to *29
Larimore, 345 miles from St. Paul. The other of these lines extends from Minneapolis by way of Barnesville, Minnesota, leaving the state of Minnesota at Moorhead, Minnesota, 241 miles from St. Paul, and entering the state of North Dakota at Fargo, North Dakota, 242 miles from St. Paul, and running

thence by way of Grand Forks, North Dakota, to Larimore, 348 miles from St. Paul.

The main line of the Company between Duluth and Larimore runs by way of Crookston, Minnesota, leaving the state of Minnesota at East Grand Forks, Minnesota, 296 miles from Duluth, and entering the state of North Dakota at Grand Forks, North Dakota, at the same official distance from Duluth, and running thence to Larimore, 325 miles from Duluth.

The Company has a branch line of railway wholly within the state of Minnesota which leaves the main line at Barnesville and extends northerly to Noyes, 391 miles from St. Paul.

It has another branch line which leaves the main line at Willmar and extends in a southwesterly direction, leaving the state of Minnesota at Jasper, Minnesota, 218 miles from St. Paul, and entering the state of South Dakota, and running by way of Sioux Falls, South Dakota, to Yankton, South Dakota, 311 miles from St. Paul, and to Sioux City, Iowa, 327 miles from St. Paul.

It has another branch line which leaves the Willmar main line at Benson and extends in a southwesterly direction, leaving the state of Minnesota at Nassau, Minnesota, 173 miles from St. Paul, and entering the state of South Dakota and running to Huron, South Dakota, 294 miles from St. Paul.

*30 3. The Minneapolis and St. Louis Railroad Company is a corporation and is a common carrier owning, maintaining and operating lines of railroad comprehending on the 30th day of June, 1906, 632.06 miles of track and operating under lease or trackage rights lines of railroad comprehending on the same date 396.43 miles of track. Its main lines of railway extend from St. Paul and Minneapolis, Minnesota, westerly by way of Winthrop, Minnesota, to Le Beau, South Dakota, from St. Paul and Minneapolis southwesterly by way of Winthrop, Minnesota, to Storm Lake, Iowa, and from St. Paul and Minne-

apolis southerly by way of Albert Lea, Minnesota, to Des Moines, Iowa.

4. The whole of the railroad properties of each of said companies have for many years constituted and still constitute respective single systems and have been and are operated by each of said companies as such. The cars, engines and supplies of each company customarily have been and are used upon its system wherever required and without regard to whether the business in which they have been or are employed has been or is interstate business or business local to a state. It always has been and is impracticable and apparently is impossible to operate the property of either of said companies situate in any state separately or to carry on transportation of passengers or freight local to a state separately from interstate passengers or freight touching that state. Each of said companies customarily has carried and does carry interstate passengers and passengers local to a state on the same train and in the same car and interstate freight and freight local to a state on the same train and, if less-than-car-load freight, in the same car; and they could not and cannot practicably or in the exercise of any fair economy whatsoever do otherwise. (See Maguire's testimony in G. N. Case, p. 797.)

5. By far the larger proportion of the business of each of *31
said companies is interstate; and by far the larger proportion of the business of each of said companies within the state of Minnesota is interstate.

For example, for the year 1906, taken as a sample year in the testimony, the freight business of the Northern Pacific Company local to the state of Minnesota was but 2.67 per cent of the Company's entire freight business and but 12.33 per cent of the Company's freight business touching the state; its passenger business local to the state of Minnesota was but 5.79 per cent of its entire passenger business and but 67.21 per cent of its passenger business touching the state. (Ex. 54 Johnson.)

6. For many years the conditions attending the transportation of passengers, of merchandise covered by the Order of September 6, 1906, or of commodities covered by Chap. 232, Gen. Laws 1907, have been and they still are substantially the same for like distances within those portions of the states of Wisconsin, Minnesota, North Dakota and South Dakota reached by the lines of railway operated by either of said companies; and whether such transportation has been or is of business local to a state, or interstate between any two of such states. (See Baird's testimony, N. P. Case, pp. 1436 to 1439, and pp. 1476-7; and Maguire's testimony, G. N. Case, pp. 792 to 795.)

Each of said companies had, prior to the taking effect of the Order of September 6, 1906, and the two-cents maximum passenger fare law, maintained an equable, that is, a relatively fair basis of rates for merchandise and passengers the transportation of which touched Minnesota without regard to whether the
*32 transportation was state or interstate between Minnesota and an adjoining state, and each of them still maintains such equable basis of rates for the transportation of commodities covered by Chap. 232, Gen. Laws 1907, regardless of whether it is local within Minnesota or interstate between Minnesota and an adjoining state.

Any substantial change in the basis of rates or in any particular rates due only to the fact that the transportation was interstate or that it was local to a state would have been actual, undue and unjust discrimination in fact; and any substantial difference in rates for the transportation of passengers, merchandise or commodities maintained by either of said companies as between traffic local to the state of Minnesota and traffic which goes between the state of Minnesota and either of its neighboring states will constitute actual, undue and unjust discrimination in fact. (See N. P. Case, Elliott, p. 1320-1, and Baird, p. 2198-9.)

7. Superior, Wisconsin, and Duluth, Minnesota, are situated

side by side at the western extremity of Lake Superior. Each is an important business center. Conditions attending transportation to and from either of them are the same as to or from the other. The railroad companies reaching them have always accorded them and do accord them like rates in and out. They ship and receive the same kinds of freight and to and from the same localities. Any substantial difference in the rates accorded them would destroy the commerce of the city given the higher rates. The propriety of a parity of rates to and from these localities has always been recognized.

For the same reasons, each of the couples of cities composed of Grand Forks, North Dakota, and East Grand Forks, Minnesota, Fargo, North Dakota, and Moorhead, Minnesota, and *33
Wahpeton, North Dakota, and Breckenridge, Minnesota, have always been accorded by the railway companies serving them like rates in and out. The cities in each pair depend upon the same carriers, have substantially the same producing and consuming markets and receive and ship the same kinds of articles. Any substantial difference in rates as between the cities composing each pair would seriously damage if not wholly destroy the commerce of the city given the higher rate and would be an undue and unjust disadvantage in fact to it and an undue and unjust preference and advantage in fact for its neighboring city. (See Baird's testimony, N. P. Case, p. 1456-8.)

Failure by the Northern Pacific Company to maintain substantially as low rates between Superior and points in Minnesota as between Duluth and other points in Minnesota would seriously impair the power of the Company to transact its interstate business between Superior and points in Minnesota, and would seriously depreciate the value of the Company's property in Superior.

8. The schedule comprehended within the Order of September 6, 1906, prescibed maximum rates for transportation within the state of Minnesota which were from 20 per cent to 25 per cent

lower than those theretofore established by the Northern Pacific and Great Northern companies, and maintained by them up to the time of the taking effect of the Order for transportation in Wisconsin, Minnesota and North Dakota regardless of whether such transportation was local to either state or interstate between any two of them. If these companies after the installation of the rates prescribed by the Order for transporta-
*34 tion within Minnesota had continued to maintain the former rates for transportation between Minnesota and an adjoining state, the result would have been serious discrimination against localities in the neighboring states.

For example, prior to the taking effect of the Order the rate maintained by the Northern Pacific on a 200-pound barrel of flour (fourth class) from Minneapolis to Fargo was 68 cents. The schedule fixed 54.2 cents as a maximum from Minneapolis to Moorhead. This is a fair example of the difference between the former interstate rates for transportation between Minnesota and an adjoining state and the rates prescribed by the Order for transportation within the state. (Ex. 41 Baird.)

On the same day that the Northern Pacific Company installed its rates in Minnesota as prescribed by the Order, it reduced its interstate rates between Superior and points in Minnesota to an exact parity with its rates between Duluth and other points in Minnesota, its interstate rates between Grand Forks, Fargo and Wahpeton, North Dakota, and Minnesota points to an exact parity with its rates between East Grand Forks, Moorhead and Breckenridge, respectively, and other Minnesota points and its interstate rates between Superior and Grand Forks, Fargo and Wahpeton, respectively, to an exact parity with its state rates between Duluth and East Grand Forks, Moorhead and Breckenridge, respectively. The reduction was substantial. For example, the reduction in the rate on first class from Superior to Fargo was from 65 cents per cwt. to 54.1 cents per

cwt.; and on fifth class from 27 cents to 21.7 cents per cwt. (Ex. 41 Baird.)

These reductions were compelled by the necessary and direct effect of the operation of the Order. Had they not been made, *35 Superior could not have competed in business in Minnesota with Duluth; Fargo, Grand Forks and Wahpeton could not have competed with Moorhead, East Grand Forks and Breckenridge, respectively, nor could Superior have transacted business successfully with Fargo, Grand Forks or Wahpeton. Moreover, although the Northern Pacific suffered a substantial loss in revenue from its interstate business, it had the choice of submitting to that loss or of suffering substantial destruction of its interstate commerce in articles covered by the Order between these localities.

On the same day that the Northern Pacific made these reductions in its interstate rates the Great Northern made similar reductions although its business between Duluth and Minnesota points is interstate. The reason for its reductions from Duluth was to preserve the relation in rates from Duluth which had always existed between localities on the Great Northern and localities similarly circumstanced on the Northern Pacific, and also to meet the reduced rates on the Northern Pacific line. (Maguire, p. 815, G. N. Case.)

9. Moorhead, Minnesota, Fargo and Bismarck, North Dakota, Billings and Butte, Montana, are so-called "jobbing centers." Prior to the taking effect of the Order of September 6, 1906, they had always been accorded rates by the Northern Pacific Company which would allow them to compete in distribution of merchandise with their nearest neighbors and with St. Paul and Minneapolis and Duluth. The sum of carload rates from St. Paul, Minneapolis and Duluth to these centers and the less-than-carload rates out from these centers to the territory geographically tributary to them respectively had been such *36 as to compare favorably with rates in and out of their local

competitors as well as with less-than-carload rates from St. Paul, Minneapolis and Duluth into the territory geographically served by them respectively. The Order of September 6, 1906, as supplemented by the Order of May 3, 1907, substantially reduced carload rates from Duluth, St. Paul and Minneapolis to Moorhead. This reduction would have given Moorhead a substantial advantage in territory accessible to its jobbing industry not only as against Fargo unless carload rates to Fargo should have been similarly reduced, but also as against Duluth, St. Paul and Minneapolis unless less-than-carload rates from these points to points geographically accessible to Moorhead, which included a considerable territory in North Dakota, should have been proportionately reduced. This reduction unless accompanied by a corresponding reduction in carload rates to Fargo from the eastern terminals would have served to build up Moorhead at the expense of Fargo and therefore to discriminate unduly and unjustly against Fargo as a matter of fact, and would destroy the relation in rates which had theretofore existed between the sum of carload rates into Moorhead and less-than-carload distributing rates out on the one hand, and less-than-carload distributing rates from Duluth, St. Paul and Minneapolis to localities accessible to Moorhead on the other. If Fargo were protected as against Moorhead by a like reduction in carload rates, it would have an advantage and preference over Bismarck in territory common to them both and an advantage over the eastern terminals in territory common to Fargo and them, unless carload rates from the eastern terminals
*37 to Bismarck and less-than-carload rates from the eastern terminals to the territory accessible to Fargo should be correspondingly reduced; and this advantage would constitute an undue and unjust preference to Fargo as against Bismarck, which competes in certain territory with Fargo, unless rates on carload lots from the eastern terminals to Bismarck should be

correspondingly reduced. And so on, from distributing point to distributing point.

10. Every rate comprehends two terminal charges, the initial and the final, and a distance haulage charge. It is a cardinal principle of rate-making that a rate for a longer distance should be proportionately smaller than one for a shorter distance; that is to say, that a rate for 500 miles should be less than twice the rate for 250 miles, if conditions of transportation be the same. Because the rate for 250 miles includes two terminal charges, and if the rate for 500 miles were twice the rate for 250 miles, it would manifestly include the equivalent of four terminal charges. Even if the haulage charge were the same per mile for a haul of 500 miles as for a haul of 250 miles, which is contrary to the rule generally applied in rate-making, the rate per ton per mile for the 500 miles should be less than for the 250 miles because in the one case the terminal charges would be spread over 500 miles and in the other over only 250 miles.

Comparison of rates at present maintained by the Northern Pacific Company from St. Paul to various stations in North Dakota and Montana with those established by the Order of September 6, 1906, and now maintained by the Company between St. Paul and Moorhead discloses that the Commission- *38
made rates from St. Paul to Moorhead are in general substantially less than the proportion of the presently maintained interstate rates of the Company to these various points in North Dakota and Montana, based on the mileage in Minnesota as compared to that of the entire haul. For example, the present rate maintained by the Northern Pacific on Class E, merchandise from St. Paul to Miles City, 743 miles from St. Paul, is 39 cents per cwt.; the rate to Moorhead, based on the proportion of 39 cents, which the mileage of the haul in Minnesota is of the entire haul, is 13 cents. The Order allows only 11 cents per cwt. from St. Paul to Moorhead, in which of course are included two full terminal charges. Maintaining rates comparison of

which shows this result, involves substantial, undue and unjust discrimination in fact against the interstate localities. (Ex. 46, Baird, N. P. Case.)

11. After the installation by the Great Northern and the Northern Pacific companies of the rates prescribed by the Order of September 6, 1906, it appeared that the sum of the locals from St. Paul to Moorhead and from Moorhead to many points in North Dakota was less than the theretofore established and maintained interstate rates from St. Paul to these points in North Dakota. Both companies thereupon established and now maintain rates from St. Paul to these North Dakota points as a rule no greater than the sum of the locals on Moorhead, but which are substantially lower in general than the interstate rates maintained by them at the time of the taking effect of the Order. Maintaining interstate rates from St. Paul to North Dakota localities substantially greater than the sum of the locals based on the state line would have involved undue and unjust discrimination in fact.

*39 It was suggested on the trial by solicitors for defendants that these reductions were made by the companies upon complaint of merchants of St. Paul, Minneapolis and Duluth; but the uncontradicted testimony of the chief witness for the complainants on this point was that the reduction was made in order to protect the power of the railroads to do interstate business,—to remove the ability of the shippers to ship to Moorhead and transship to the point of destination. As a matter of fact, the reasons for such reduction were to prevent trans-shipment at Moorhead in order to take advantage of the lower sum of the locals; to retain on its line traffic which was liable to reach Moorhead over other lines by reason of competition; and as to less-than-carload lots to enable jobbers in the Twin Cities and Duluth to compete with Moorhead and Fargo in territory which otherwise the latter would have exclusively occupied by reason of their closer proximity thereto, an advantage to which it

cannot be said such jobbers were entitled although they had been able theretofore to participate in such business.

12. It is one of the fundamental dogmas of rate-making that the haulage charge per mile shall not increase with increasing distance if conditions be the same. The Order of September 6, 1906, promulgates a schedule which for first class merchandise, for example, allows a terminal charge of 11.02 cents per cwt. and a haulage charge of .98 cent per five miles up to 200 miles, then a haulage charge of .98 cent per ten miles for added distance up to 400 miles, and then a haulage charge of .98 cent per twenty miles up to 500 miles—the limit of distance covered by the Order. Both the terminal charge and the haulage charge allowed for the other merchandise classes are a fixed percentage *40
of those allowed for First. Under this schedule a hundred pounds of merchandise transported by the Northern Pacific from St. Paul to Moorhead, 248 miles, has been hauled for 48 miles, at the rate of .98 cent per ten miles when Moorhead is reached. If this same haulage charge of .98 cent per ten miles be applied for the remaining distance of the haul from St. Paul to Spokane, Washington, 1,510 miles from St. Paul (which is taken as a fair example merely for the illustration of this principle), it would produce a rate from St. Paul to Spokane on First class merchandise of $1.79 per cwt. The Interstate Commerce Commission in the Spokane Rate Case has fixed the reasonable rate on First class merchandise from St. Paul to Spokane of $2.50. Maintaining this rate from St. Paul to Spokane and the Commission's schedule in Minnesota at the same time, necessarily involves the raising of the per mile haulage charge after the Minnesota state line has been crossed, or the charging a higher rate within Minnesota for its mileage proportion of long haul interstate business than for business local to the State carried on over the same rails and under the same conditions and involves necessarily undue and unjust discrimination in fact against localities westerly of the Minnesota-North Dakota

boundary line. Defendants' solicitors, however, insist that in extending the State-made rate beyond the boundary line, if an equable basis is sought, the ton-mile charge for such extension must be found by dividing the total charge to such line by the distance to it from the point of origin, which would considerably increase the extension rate beyond the State line over the rate if extended by the method suggested by complainants.
*41 This method suggested by defendants is not the principle, however, on which the State schedule of rates is constructed, and even so it does not give traffic carried on the extended interstate rate the benefit of the spread of the two terminal expenses over the longer haul.

13. For more than twenty-five years the Northern Pacific Company has maintained an equal basis of rates on merchandise between its eastern terminals and Butte and its western terminals and Butte and between its eastern terminals and localities intermediate between them and Butte and between its western terminals and localities intermediate between them and Butte. Other railroads reaching Butte have during the same time maintained like rates to Butte from Sioux City, Omaha, St. Joseph and Kansas City on the east, and from San Francisco, Sacramento and Los Angeles on the west. Butte has been as the hub of a wheel with spokes representing equal rates to these various cities. Industries have been born and have grown in reliance upon this parity of rates. Intermediate points have had rates fixed in proportion with the Butte rates. Competition of markets and of carriers has brought this about. The Northern Pacific Company cannot maintain its present Commission-made rates between its eastern terminals and Moorhead and at the same time, its present interstate rates from its eastern terminals to Butte without substantial discrimination in fact against Butte or localities intermediate between its eastern terminals and Butte. If it lowers its rates from its eastern terminals to Butte and intermediate stations

to such an extent as to obviate substantial discrimination in fact, it must, to preserve the relation which has always existed, lower to a like extent its rates from its western terminals to Butte and intermediate stations. If, then, the Northern Pacific *42
maintains the Commission-made rates between its eastern terminals and Moorhead it must either substantially discriminate in fact or destroy the general relation of rates which has existed for many years in the territory between the Missouri river and the Pacific coast.

14. Prior to the taking effect of the Order of September 6, 1906, the Great Northern and Northern Pacific Companies had established joint through rates in connection with other carriers from all localities easterly or southerly of the state of Minnesota to all points in Minnesota westerly of St. Paul and Minneapolis reached by them respectively, and these rates were in force at the time of the taking effect of the Order. After the rates prescribed by the Order were installed, the sum of the locals on St. Paul from all localities southerly and easterly of Minnesota to all localities in Minnesota westerly of St. Paul and Minneapolis reached by these companies was substantially less than the then existing interstate rates between such localities southerly or easterly of Minnesota and such Minnesota localities. Maintaining such a relation of rates would have involved undue and unjust discrimination in fact against the localities easterly and southerly of Minnesota and an unjust and undue preference and advantage in fact for St. Paul; because merchandise could have been shipped from all localities easterly and southerly of Minnesota to St. Paul on the theretofore established and then existing interstate rates and distributed from St. Paul to all points westerly of St. Paul and Minneapolis on the rates prescribed by the Order for substantially less charges in the aggregate than would have been incurred for the through haul under the then existing through interstate rates. In order to avoid this discrimination the companies forthwith *43

after the taking effect of the Order withdrew the then existing interstate rates and established a new tariff of through rates which were no higher than the sum of the locals on St. Paul. For example, the former through rates from Chicago to Wadena, Minn., on First class merchandise was $1.09 per cwt. The sum of the locals on St. Paul after the taking effect of the Order was $1.004. The present through rate is $1.004, being a reduction of 8.6 cents per cwt. (Ex. 44 Maguire, pp. 818-20, G. N. Case.)

15. The proof is clear that conditions attending transportation are substantially the same in Minnesota and North Dakota and whether the transportation is local to either state or interstate between them. If unjust and undue preference or advantage is to be avoided, like rates must exist for like distances under like circumstances. The Northern Pacific and Great Northern Companies have, prior to the taking effect of the Order, maintained an equable basis of rates in the territory which these two states compose without regard to state lines. For example, the interstate rates from Moorhead, Minnesota, westerly into North Dakota have been the same as from Moorhead easterly into Minnesota and no conditions have existed or do exist which justify a different basis of rates for eastbound to that for westbound transportation.

Prior to the installation of the rates prescribed by the Order the rate per cwt. of First Class merchandise for 100 miles, for example, out of Moorhead, ther westerly into North Dakota or easterly into Minnesota, was 43 cents. For transportation westwardly into North Dakota this rate from Moorhead still
*44 exists. The rate prescribed by the Order and now in effect from Moorhead eastwardly into Minnesota is per cwt. of First Class merchandise 30.6 cents. This disparity of rates for transportation under substantially similar conditions and which disparity increases as distance easterly from Moorhead increases constitutes an undue preference and advantage to the east-

wardly localities in Minnesota and a corresponding prejudice and disadvantage to the interstate westwardly localities in North Dakota. If the Companies maintaining this relation of rates, unfair in fact, are to continue to maintain the rates prescribed by the Order, they can remove the existing undue and unjust discrimination in fact against the interstate localities in North Dakota only by reducing the interstate rates from Moorhead to localities in North Dakota to a substantial parity with those maintained from Moorhead to localities at like distance in Minnesota. (Ex. 35 Baird, N. P. Case.)

16. The Great Northern Company owns and operates a branch line to Noyes, 391 miles from St. Paul. The line between St. Paul and Noyes is wholly within the state of Minnesota. Conditions attending transportation of merchandise from St. Paul to Noyes are at least no more favorable than those attending transportation from St. Paul to localities in North Dakota on the main line of the Company and equally distant from St. Paul. All that is claimed by complainants is that conditions are substantially alike. Prior to the taking effect of the Order the rate per cwt. of First Class merchandise for transportation on the Great Northern from St. Paul to a locality 390 miles distant and situate either in Minnesota or in North Dakota was 96 cents. The Commission-made rate from St. Paul to Noyes is 68.8 cents. Such a disparity in rates without substantial dissimilarity in conditions constitutes undue and unjust discrimination in fact. (Ex. 46 Maguire; testimony, Printed Record, p. 796, G. N. Case.) *45

17. The Order of September 6, 1906, prescribes a basis of rate-making. Its schedule is framed to secure a fixed relation between rates on the same class for different distances, a fixed relation between rates for the different classes for the same distance, and therefore manifestly a fixed relation between rates for different classes for different distances. These relations are so stable that, given the rate for any distance on any

class, the rate for any other distance on any other class may be determined by one who knows the method upon which the schedule is constructed. An avowed purpose of the schedule is to secure equality of rates.

The Great Northern Company operates a line from St. Paul to Sioux City, Iowa, 327 miles from St. Paul, which leaves the state of Minnesota and enters the state of South Dakota at a distance approximately 218 miles from St. Paul—the distance from St. Paul of Jasper, the border Minnesota town.

It operates another line from St. Paul to Huron, South Dakota, 294 miles from St. Paul, which leaves the state of Minnesota and enters the state of South Dakota at a distance approximately 173 miles from St. Paul—the distance from St. Paul of Nassau, the border Minnesota town. Between St. Paul and Willmar, Minnesota, 102 miles from St. Paul, these lines are identical.

Under the schedule prescribed in the Order, the progression of the rate—the haulage charge with increasing distance—breaks in two at a distance of 200 miles. That is to say, the haulage charge for First Class (and for other classes in fixed
*46 relation) having been allowed at .98 cent for each five miles up to 200 miles is cut to .98 cent for each ten miles beyond 200 miles and up to 400 miles.

When the line between Minnesota and South Dakota is reached on the St. Paul-Sioux City line, the progression of the rate prescribed by the schedule is .98 cent per ten miles for First Class.

When the line between Minnesota and South Dakota is reached on the St. Paul-Huron line, the progression of the rate is .98 cent per five miles of haul.

It is apparent that unless undue and unjust discrimination shall exist in the rates on one of these interstate lines as compared with the other, the same basis of making the rate, the same relation between rates for different distances and different

classes must be maintained on one line as on the other, and that notwithstanding that the 200-mile point of distance on the St. Paul-Huron line is within the state of South Dakota, the progression of the rate should break in two as it has on the St. Paul-Sioux City line on which that point was reached and that break was made within the state of Minnesota.

The schedule prescribes fixed relations between rates for different distances and different classes. If the relation must be adhered to within the state of Minnesota, it cannot be departed from substantially merely because of the intervention of a state line at one distance or another without involving undue and unjust discrimination in fact in rates. (See Maguire's testimony in G. N. Case, p. 795-6.)

18. Since the taking effect of the Order of September 6, 1906, both the Great Northern and the Northern Pacific Com- *47
panies have reduced their interstate rates on merchandise from their eastern terminals in Wisconsin and Minnesota to all localities in general in North Dakota. Such reductions have been made as a rule only to such extent as was necessary to remedy the discrimination resulting from the fact that the sum of the local rates from the eastern terminals to the border towns of Minnesota and from such border towns to the several localities in North Dakota was less than the theretofore established and then existing through interstate rates from the eastern terminals to the several respective localities in North Dakota and not to such extent as to remedy the discrimination resulting from the fact that in most cases the general basis of rates on merchandise for traffic within Minnesota is substantially lower than that maintained in North Dakota or for traffic crossing the line between North Dakota and Minnesota notwithstanding the substantial equality of conditions. Such substantially lower basis of rates for transportation of merchandise within Minnesota than for that within North Dakota or for that between the two states still exists and constitutes undue and unjust

43

discrimination in fact. Complaints have been made to the companies of the existence of this discrimination. [Baird (N. P. Case) 1540-1; 1467; 1523; 1527; 1464; 1507; Elliott (N. P. Case) 1384; 1385; 1404; Maguire (G. N. Case) 794; 832; 841; 798; 799.]

19. St. Cloud, Minnesota, is on the Barnesville main line of the Great Northern and is 168 miles easterly from Moorhead, at which point this line leaves the state of Minnesota and enters the state of North Dakota. Fergus Falls, Minnesota, is on the same line, 56 miles easterly from Moorhead. They are each
*48 distributing centers, so declared by the Commission's Order of May 3, 1907. Whether discrimination in fact exists between rates is determined by comparison of the rates involved. If conditions are substantially the same, rates for like distances should be the same, and if not the same, undue and unjust discrimination in fact will exist. Conditions are substantially alike so far as transportation goes for a distance on the Great Northern of 168 miles westerly of Fergus Falls as for the same distance westerly of St. Cloud. Because they are distributing rates from Fergus Falls to points within that distance westerly should be the same as from St. Cloud to points of equal distance westerly. Rates on articles covered by the Order of September 6, 1906, from St. Cloud westerly within such distance of 168 miles are substantially lower than those maintained by the Great Northern to points in North Dakota of like distance westerly of Fergus Falls. Such disparity depends only on the fact that in the case of the higher rates the state boundary line is crossed and on no other condition whatsoever; and it constitutes undue and unjust discrimination in fact not only against the shipper at Fergus Falls, but, as well, against the consumer in the North Dakota towns in question.

20. The main lines and branches of the Northern Pacific and Great Northern Companies within the states of Minnesota and North Dakota lie (wholly, excepting certain limited tracts

in which grain cannot be grown—such as the Bad Lands of North Dakota) within grain fields; and grain is shipped in substantial quantities from nearly all stations in these fields to Duluth, Minneapolis and Superior.

Shipments of coal originate at the Head of the Lakes, that is to say, Duluth, Minnesota, or Superior, Wisconsin, and find *49 their destination at all localities served by the Companies or either of them in Minnesota and eastern North Dakota.

Shipments of lumber originate at Duluth, Cloquet, Little Falls and other points in Minnesota and are destined to points throughout Minnesota and North Dakota.

Shipments of live stock originate in Minnesota, North Dakota and eastern Montana and go to South St. Paul or Chicago.

Conditions attending transportation are substantially the same as to all these commodities moving eastwardly, whether the shipment originates in Montana, North Dakota or Minnesota or whether it finds its termination at one of the Minnesota terminals of the Companies or at Superior, Wisconsin.

Conditions attending transportation are substantially the same as to all these commodities moving westwardly whether the shipment originates at a Minnesota point or at Superior, Wisconsin, or whether it finds its destination in Minnesota or North Dakota.

Because conditions attending transportation are substantially the same, any difference in the basis of rates charged for transportation of coal whether the shipment originates at Duluth, Minnesota, or at Superior, Wisconsin, and is destined to any locality in Minnesota or in eastern North Dakota, or in the basis of rates for transportation of grain, whether the shipment originates in Minnesota or North Dakota or is destined to Minneapolis or Duluth or Superior, or in the basis of rates for transportation of lumber whether the shipment is destined to a point in Minnesota or to one in North Dakota, or in the *50 basis of rates for the transportation of live stock whether the

shipment originates in Minnesota, North Dakota or eastern Montana involves an undue and unjust prejudice and disadvantage in fact against the localities subject to the higher basis of rates and an undue and unjust preference and advantage in fact to the localities given the lower basis. Establishing the rates prescribed by Chapter 232, Gen. Laws 1907, and maintaining these rates for transportation wholly within Minnesota simultaneously with the maintenance of the interstate rates at present maintained for interstate traffic between Superior and localities in Minnesota, North Dakota and eastern Montana and between localities in Minnesota and localities in North Dakota and eastern Montana would involve on the part of the Northern Pacific and Great Northern Companies undue and unjust discrimination in fact against shippers, receivers and localities transacting the interstate business and would seriously impair the interstate business of the carriers. If the Companies shall be compelled to maintain within Minnesota the rates prescribed by Chapter 232, they will be compelled to reduce the basis of their interstate rates between eastern Montana and North Dakota points and Minnesota points and between eastern Montana, North Dakota and Minnesota points and Superior to a substantial parity with the basis prescribed by Chapter 232 in order to avoid undue and unjust prejudice and disadvantage in fact against shippers and localities transacting the interstate business as well as in order to protect the interstate business of carriers against serious impairment.

Such reduction must be substantial. For example, the present rate on soft coal from Duluth to Wahpeton is $2 per ton.
*51 The rate prescribed by Chapter 232 from Duluth to Breckenridge is $1.31 per ton. That act provides that a minimum carload of soft coal shall be 30,000 pounds or 15 tons. So that the reduction that will be necessary to avoid discrimination against the interstate locality in the rate on soft coal will be $10.35 per minimum carload.

21. Duluth, Minnesota, Superior, Ashland, Green Bay, Manitowoc, Sheboygan and Milwaukee, Wisconsin, Gladstone, Michigan, Chicago, Illinois, the Peoria, Illinois, district, the Springfield, Ilinois, district, the Streator, Illinois, district, and the LaSalle, Illinois, district, are all competitive points for the distribution of coal into the state of Minnesota.

For many years rates on coal from the various distributing points to localities in southern Minnesota have borne such a relation as to admit of free competition of the various distributing points and of the carriers serving them.

If the rates on coal prescribed by Chapter 232, Gen. Laws 1907, shall take effect, the result will be substantial reduction in rates on coal from Duluth to southern Minnesota localities. Such a reduction will deprive all these various distributing points in Wisconsin, Michigan and Illinois of their power to compete with Duluth in its distribution of coal in Minnesota unless the carriers serving them shall reduce their interstate rates into Minnesota to a parity with those prescribed by Chapter 232, from Duluth. If such carriers shall reduce their interstate rates in Minnesota to a parity with the rates prescribed by Chapter 232, the relation which now exists between rates on coal from these various distributing points and localities in northern Iowa and in South Dakota will be destroyed unless *52
rates shall be similarly reduced from these various distributing centers to localities in these two districts.

22. Interstate rates on cattle, hogs, sheep and coarse grain would be affected by the rates prescribed by Chapter 232 in the same manner as has been found with regard to rates on wheat and coal.

23. Under the milling-in-transit privileges, so-called, owners of wheat at any point in Minnesota, North Dakota or South Dakota may pay rates equal to the sum of the rate between the point of shipment to Minneapolis and the proportional rate from Minneapolis to Chicago (for many years and at present

the sum of 7.5 cents per cwt.), have it milled at Minneapolis and within a limited period of time forwarded to Chicago as flour.

In order to allow mills located at other towns in Minnesota to compete with Minneapolis a like milling-in-transit privilege has been accorded owners of wheat to ship *via* such other towns as *via* Minneapolis; and mills have been established in many such towns under a guaranty that rates into the towns in which such mills are located on wheat in and flour out to Chicago should not exceed the rates from the same points to Chicago *via* Minneapolis with the milling-in-transit privilege. Chapter 232, Gen. Laws 1907, substantially reduces rates on wheat within Minnesota. The result will be, if that law takes effect, that the milling-in-transit rate from points in Minnesota *via* Minneapolis to Chicago will be automatically reduced substantially. Unless then all interstate rates between Minnesota points and Chicago *via* some interior mill town and with a milling-in-transit privilege shall be reduced to a substantial parity with the reduced milling-in-transit rate to Chicago *via*
*53 Minneapolis, Minneapolis will have a substantial advantage in its interstate rates on wheat over the various mill towns in the interior of the states and wheat in general will as a result of this advantage go to Minneapolis.

24. Prior to the taking effect of Chapter 97, Gen. Laws 1907, the general basis of rates for the transportation of passengers between any two points on the Northern Pacific System had been for some years three cents per mile for passengers of twelve years of age and over, and one and one-half cents per mile for passengers under twelve years of age.

Chapter 97, Gen. Laws 1907, prescribes as a maximum for transportation of passengers wholly within the state of Minnesota two cents per mile for passengers of twelve years of age or over and one cent per mile for passengers under twelve years of age.

After the maximum rates prescribed by Chapter 97 were installed, the sum of the locals between Moorhead and other Minnesota points and Moorhead and points westerly thereof was less than the then existing interstate rates between Minnesota points and points westerly thereof.

The result of this disparity between the through interstate rate over Moorhead and the sum of the locals over Moorhead was this: In the first month after the taking effect of Chapter 97 the revenue for passenger business on the Northern Pacific between Moorhead and other Minnesota points increased 647 per cent over that for the corresponding month of the preceding year, while, eliminating Moorhead business, the revenue for passenger business within the state decreased 2 per cent. In June, 1907, the second month after the taking effect of Chapter 97 there were sold by the Northern Pacific Company 4037 tickets between St. Paul or Minneapolis on the one hand and Moorhead or East Grand Forks on the other as compared with only 172 such tickets in the corresponding month of the year before; and in June, 1907, there were sold only 173 tickets between St. Paul or Minneapolis on the one hand and Grand Forks and Fargo on the other as compared with 984 such tickets in the corresponding month of the year before. In May and June, 1906, only one cash fare was collected on a train between Moorhead and St. Paul or Minneapolis; in those months in 1907 there were 1168 full cash fares and 82 cash half-fares so collected. *54

These facts compel the conclusion that the necessary, immediate, direct effect of the operation of Chapter 97 was to deprive the Northern Pacific Company of a substantial amount of its interstate passenger business through Moorhead.

25. Nothwithstanding the facility with which interstate passengers could avoid the discrimination against them by making two contracts with the Company, one of which should cover the mileage in Minnesota, discrimination in fact against

the interstate passenger through Moorhead on the Northern Pacific still existed and was practiced. It existed against a passenger who, applying for a through ticket did not know that the sum of the locals on Moorhead was less than the through rate, against the pasenger with a trunk which he could not check through unless on a through ticket, against a passenger who was compelled to use a sleeping-car.

As soon as it reasonably could do so, the Northern Pacific remedied this discrimination by reducing all its interstate
*55 fares for passenger transportation through Moorhead to an amount no greater than the sum of the locals over Moorhead. Meantime and before tariffs establishing the new reduced interstate rates over Moorhead had been filed, the state of Wisconsin had enacted a two cents per mile passenger fare law, and the state of North Dakota a two and one-half cents per mile law. The rates, therefore, newly established by the Northern Pacific Company between St. Paul, for example, and points in North Dakota and beyond, were in general less than the theretofore existing rates by approximately one cent per mile for the mileage of the transportation in Minnesota and one-half cent per mile for the mileage in North Dakota. And the rates newly established by the Northern Pacific Company jointly with other companies for passenger transportation between points easterly of Minnesota and points on the line of the Northern Pacific were in general less than the theretofore existing rates by approximately one cent per mile for the mileage of the transportation in Wisconsin and Minnesota and one-half cent per mile for the mileage in North Dakota.

These reductions in rates were compelled by the necessary immediate and direct effect of the operation of the laws of the respective states above recited, not only in order that undue and unjust discrimination in rates might be avoided, but, as well, in order that the companies might transact interstate passenger business freely and without impairment of volume.

26. Prior to the taking effect of the respective orders complained of and of the two cents maximum passenger fare law, the tariffs of the Great Northern and Northern Pacific Companies for the transportation of passengers or merchandise in Wisconsin, Minnesota, North Dakota and South Dakota were fair *56
as between the different states, and the local tariffs in each state were fair as compared with the interstate tariffs between such states or any two thereof; and the tariffs now maintained by the Companies and each of them for the transportation of commodities covered by Chapter 232 are fair as between these states, and the local tariffs in each state are fair as compared with the interstate tariffs between such states or any two thereof.

The installation of the rates prescribed by the respective Orders destroyed that fairness as to merchandise rates, the installation of the two cents pasenger rate destroyed it as to passenger rates, and the installation of the rates prescribed by Chapter 232 would destroy it as to rates on commodities covered by it.

27. It is wholly impossible for carriers situated as are the Great Northern, Northern Pacific and Minneapolis & St. Louis companies to maintain materially lower rates or a materially lower basis of rates or a different classification of subjects of transportation, or a different relation between rates for different classes of merchandise, for traffic wholly within Minnesota than for that between Minnesota and any of its neighboring states without unjust and undue discrimination in fact against the localities in the neighboring states, and without serious impairment of the volume of the interstate business of the carriers. Such lower basis of rates within Minnesota than between Minnesota and its neighboring states would result in the promotion of the growth and prosperity of localities in Minnesota at the expense of localities in neighboring states and the enhancement of the value of property in Minnesota and *57

the serious impairment of the value of the property of all business men as well as of that of the carriers themselves in the neighboring states.

28. Duluth and Superior, Grand Forks and East Grand Forks, Fargo and Moorhead, and Wahpeton and Breckenridge are so situated that each pair must be considered for the purpose of rate-making as one locality. Both as a practical matter of the operation of a railroad and in order that undue and unjust discrimination as between the members of any pair may be avoided, each city of each pair must have rates equal to those accorded to the other city. If different rates, a different classication or a different basis of rates be lawfully prescribed by one regulating power in or out of one city of any pair to those prescribed by another regulating power in or out of the other city of the pair, the carriers serving them both must, in order to avoid undue and unjust discrimination in fact as between them as well as to preserve their own power to transact business with each of them, adopt for each city the lower rates or basis of rates, or clasification prescribed for either city. (As bearing generally upon the foregoing findings, numbered 1 to 28, relating to the question of interference, see testimony of Staples, (N. P. Case) pp. 2646, 2649, 2650, 2704-2790, 2891, 2916).

29. If it shall be necessary for the companies involved, in order that discrimination may be avoided, or in order that the companies may preserve the volume of their respective businesses in interstate transportation free from impairment in volume, to install for their interstate business a basis of rates no higher than these respectively prescribed in the Act and
*58 Order complained of, and to extend the rates for their interstate long-haul business upon the principal provided in said Act and Order, the result will be a substantial diminution in the revenues of the companies from their interstate business. For example, the diminution in the revenue of the Northern Pacific Company for the year ending June 30, 1906, the last

fiscal year prior to the taking effect of the Order of September 6, 1906, from its interstate business in transportation of commodities covered by Chapter 232 alone, if the basis prescribed by Chapter 232 had been applied to its rates for such interstate business, wou'd have been $4,193,283.04; and the loss in such interstate revenue for such year for transportation of merchandise covered by the Order of September 6, 1906, if the basis prescribed by the Order had been applied to its rates for such interstate business, would have been $4,119,761.96. The loss in its interstate business from passenger transportation, if the two cents maximum rate had been applied during such year, would have been $1,444,955.35, or a total loss, on account of the Acts and Orders complained of, of $9,758,000.35.

If, in order to prevent discrimination as between different states, it shall be necessary for the companies involved to apply for local business within the respective states, the same basis of rates as those prescribed for business local to Minnesota by the Acts and Orders respectively complained of, the loss in revenue to the companies involved will be substantial. For example, in the year 1906 the loss in revenue of the Northern Pacific Company, if the basis prescribed by Chapter 232 had been applied to its local business in transportation of commodities covered thereby in other states, would have been *59
$198,540.51; and its loss in revenue, if the basis of rates prescribed in the Order of September 6, 1906, had been applied to its local business in other states for transportation of merchandise covered thereby, would have been $952,644.83, or a total loss on freight of $1,151,185.34; and if the two cents maximum passenger rate had been applied to its local business in other states, the loss in revenue would have been $990,908.82, or a total loss, under the Acts and Orders complained of, of $2,142,094.16.

The foregoing findings of facts with respect to the effects *60
of the prescribed rates upon interstate traffic, established as

they are by convincing and undisputed testimony and supported by the records and papers of the respective companies, are made without regard to the justness or otherwise in fact of the interstate rates so affected by such local rates, and as this can be determined only by Congress or its administrative agent the Interstate Commerce Commission, subject of course to the power of the Court in a proper case to prevent confiscation or extortion, this Court cannot, in this suit, determine the reasonableness or otherwise of such interstate rates. Before it can take cognizance thereof the question must have been presented to and passed upon by the proper Federal tribunal created for that purpose. Until then, as they are legal, they must be accepted as reasonable and the State can take no action which will compel a modification thereof as a condition of doing interstate business.

Interference with interstate commerce arises from the fact that to prevent discrimination the rates must be modified so as to correspond substantially with the State-made rates and from the further fact that interstate commerce cannot in general be maintained at all unless they are so modified. It was directly held in *Louisville & Nashville Railway Co. v. Eubank*, 184 U. S. 27, that the carrier cannot be compelled to adjust its interstate rates with reference to State-made rates, and since they must harmonize to prevent unjust discrimination and to enable the carrier to retain its interstate business, the State in its regulation of rates must do so with reference to their effect upon interstate commerce.

The facts as found establish conclusively that the State in
*61 the rates prescribed by it has not kept within the limitations imposed upon it and has exceeded its constitutional powers in that such rates constitute a direct interference with and impose a burden upon interstate commerce and effect unjust discrimination as between interstate localities.

If when this case was in the Supreme Court, and on the

record then before it the Court could say with reference to the claim of interference then made that "The question is not, at any rate, frivolous," it would seem that on the facts here found to exist a conclusion that the prescribed rates operated as a direct interference with and a burden upon interstate commerce must be inevitable. It follows that the relief sought in these several suits must be granted.

The question as to whether the orders of the state commission and the acts of the legislature complained of constitute such an interference with interstate commerce and operate as a burden thereon by reason of the matters of fact hereinbefore found to exist is, however, not altogether free from doubt, and it is proper, therefore, regardless of the views of the Master, that he should proceed to make findings upon all the issues in the case.

VI. *62

VALUATIONS OF PROPERTY DEVOTED TO PUBLIC SERVICE.

In determining the remaining issues in the case, the initial step is to ascertain and determine the value of the property devoted to the public service and upon what basis such valuations should be made. In the leading case of *Smyth v. Ames,* 169 U. S. 522, adhered to and constantly cited in every rate case since coming before the courts, the following language is used:

> "It cannot be assumed that any railroad corporation, accepting franchises, rights and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services and the peo-

ple financially interested in its business and affairs have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it.

* * * * * * * * * *

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

Here we have a clear declaration that a corporation performing a public service cannot be required to use its property for the benefit of the public without receiving just compensa-
*63 tion therefor, not *some* compensation but just and reasonable compensation, based upon the value of such property. There are, of course, exceptions to this rule. Under no circumstances can the rates be excessive, extortionate or unreasonable. They must be just to the public as well as to the carrier. If the road was unwisely conceived, unfavorably located and not construct-

ed in response to public demand, a return upon such value is not to be expected if it compels unjust rates. But no conditions exist in these cases to take them out of the general rule.

It also appears from this and subsequent cases that it is the present value of the property which is to be taken as a basis of rates. As again stated by the same Court in *Wilcox v. Consolidated Gas Company*, 212 U. S. 19: "There must be a fair return upon the reasonable value of the property at the time it is being used for the public * * * and we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule."

This clearly shows that the company is to share as well as the public in the general growth and prosperity of the country. It would seem, therefore, that the value of these properties can best be determined by reference to the cost of reproduction at the present time. As stated in the Wilcox case, cited in the decision rendered by the lower court upon a review of prior decisions of the supreme court of the United States,

> "It is impossible to observe this continued use of the present tense in these decisions of the highest court without feeling that the actual of reproductive values at the time of inquiry is the first and most important figure to be ascertained." *64

The roads under consideration were constructed and completed many years ago and what may have gone into them, if it could be determined with reasonable certainty, would not take into consideration the changed condition of the country since their original construction, its growth and prosperity—in which the companies are entitled to share—and by reason of changed conditions and lapse of time it has little weight in

arriving at present values. As stated by Judge Hook in the recent case of *Missouri, Kansas & Texas Railway Company v. Love, et al.*, in this circuit,

> "There is another matter to be regarded, not specifically mentioned in the above excerpt from the opinion of Mr. Justice Harlan. An established railroad system may be worth more than its original cost and more than the mere cost of its physical reproduction. It has passed the initial period of little or no return to its owners which, of greater or less duration, almost always follows construction and is not infrequently marked by default and bankruptcy. The inevitable errors in its building which finite minds and hands cannot avoid have been measurably corrected, time and effort have produced a commercial adjustment between it and the country it was intended to serve, relations have been established with patrons, and sources of traffic have been opened up and made tributary. In other words,
> *65 the railroad, unlike one newly constructed, is fully equipped and is doing business as a going concern. It has attained a position after many experiences common to railroad enterprises which entail loss and cost not paid from current earnings and which correspondingly make for value."

It is here proper to say that the foregoing decision was written in a very carefully considered case, in which many of the issues were practically the same as in the instant cases, and wherever applicable it must control the Master in determining the questions here raised. And this is so not only because it is a decision of one of the judges of this court but because it is in harmony with other like decisions of this court and of the supreme court of the United States and contains, as the Master believes, a comprehensive and accurate statement of the law and discloses a lucid conception and clear expression of the facts which are very generally found to exist in all these railroad rate cases. Practically everything contained in that decision is applicable to or has a more or less direct bearing upon the cases

here under consideration and completely covers and denies many of the contentions of counsel for the State—urged at great length and with marked ability before the Master.

In the light of this decision and others therein referred to and approved, our first duty is to ascertain the fair value of the property devoted to the public service.

To this end a large volume of testimony was produced before the Master on behalf of complainants and the State, respectively, as to the reproduction cost of such property—and by such property is included only that which is used for the benefit of the public and which, with the revenue directly or indirectly derived from such use, is alone to be considered in determining the question of a reasonable rate. Other revenues *66
and other properties the company may have but as to them the public has no concern.

Prior to suit brought the State by its Railroad & Warehouse Commission called upon the defendant railroad companies and all other like companies in the state for a statement of all the properties of the companies, respectively, devoted to public use, with the valuation and the cost of reproduction new within the state, such statement to be made and returned upon itemized blank forms or schedules furnished for the purpose consisting of thirty-nine different items, into which divisions were to be made, and which when filled out would constitute an estimate of cost of reproduction of all the physical properties of each of said companies as made by it.

This led to a personal examination of the physical properties of the railroad companies which was made by the State's engineer, employed for the purpose, and also by the agents and officers of the respective companies, and such schedules as so filled out and returned, with sundry modifications thereof by them made, have been produced before the Master, and testimony in support thereof was given by witnesses making such examinations. Three competent and reliable real estate agents

in each of the cities of St. Paul, Minneapolis and Duluth were selected by the railroad companies to make an appraisal of the terminal properties, exclusive of improvements, of each of the roads in their respective cities, and the valuations placed upon the properties by said several sets of appraisers in their respective cities, supported by their testimony produced before the Master, have been used by complainants as a basis for terminal
*67 values in said respective cities. These examinations and appraisements of railroad physical properties were made in the years 1906 and 1907 and the valuations so found were brought up to June 30, 1908, by adding thereto the valuations of properties acquired after such examinations and appraisements were made at the actual cost thereof.

The evidence discloses a wide difference of opinion with reference to the value of these properties, and in fairness to both parties to the controversy the Master has made findings as to each item in the schedule referred to and produced before him, and, where as to any item there is a very substantial difference between the parties, or between them and the value so found by the Master, he has briefly stated his reasons for the findings made.

The Master's findings of value are as follows:

VII.

REAL ESTATE VALUATIONS AS OF JUNE 30, 1908.

Item 1. Lands for right-of-way, yards and terminals:

Northern Pacific case, amount allowed.... $21,024,562.90

This amount is made up as follows:

Terminal properties, St. Paul appraisement of Read, Watson & Taylor, as modified by railroad company.....	7,645,100.24
Add 5 per cent for cost of acquisition and consequential damages	382,255.01

Property acquired after appraisement.....	328,725.69	
Minneapolis, appraisement of Elwood, Barney and Ridgeway, as modified by railway company	4,027,616.17	
Add 5 per cent for acquisition and consequential damages	201,380.80	
Property acquired after appraisement.....	227,737.26	
Duluth, appraisement of Stryker, Mendenhall and Little	3,602,443.43	*68
Add 25 per cent for railway value, cost of acquisition and consequential damages....	900,610.85	
Total value of terminals.....	17,315,869.45	
Lands outside of terminals.....	3,708,693.45	
Grand total.....	21,024,562.90	
Great Northern case; amount allowed.....	25,172,630.80	
St. Paul, appraisement of Read, Watson and Taylor	6,433,348.00	
Add 5 per cent for cost of acquisition and consequential damages	321,667.40	
Minneapolis, appraisement of Elwood, Barney and Ridgeway	11,619,765.00	
Add 5 per cent for cost of acquisition and consequential damages.....	580,968.15	
Duluth, appraisement of Stryker, Mendenhall and Little	713,280.00	
Add 25 per cent for railroad value, cost of acquisition and consequential damages...	178,320.00	
Total value of terminals.....	19,847,366.56	
Lands outside of terminals.....	5,325,284.25	
Grand total	25,172,650.80	
Minneapolis & St. Louis case; amount allowed	5,999,397.90	

Minneapolis, appraisement of Elwood, Barney and Ridgeway	4,556,298.00
Add 5 per cent for cost of acquisition and consequential damages	227,814.90
Land outside of terminals	1,215,285.00
Grand total	5,999,397.90

*69 In arriving at the foregoing valuation of terminals, upon a careful examination of the testimony the Master has taken the valuation of the terminal properties made by the three appraisers appointed by the railroad companies in each of the three cities named and who gave their testimony in these cases as found in the record and made such valuation a basis for his conclusions. He is of opinion that the reductions made from such valuations by the Northern Pacific Company as to its properties in St. Paul and Minneapolis were clearly justified by conditions differentiating the properties upon which such reductions were made from other properties valued by the appraisers and which were not fully appreciated by them. They were much farther removed from the business centers of the cities and partook more of the nature of suburban property.

While it is true that the highest value of these terminal properties is their adaptability for railroad purposes and they must be acquired in a continuous tract suitable and convenient to meet the demands of the business and traveling public, thus largely enhancing their value, yet it is not true that these values for such purpose are limited only by the needs of the company and upon the theory that it must have the property or abandon the enterprise. It is not the needs of the company but the peculiar fitness and adaptability of the property for railroad purposes which gives it an enhanced value—often very much greater than for any other purpose. The fact that there is other property equally available in the immediate vicinity that a line of road of substantially the same efficiency and an-

swering a like purpose can be secured by changing its course of the location of terminals may be properly taken into consideration as bearing upon railroad value. While it is true *70
that in these cases these particular terminals and rights of way are the subject of valuation, and no other, still such valuation must not be based upon the assumption that the companies must have them at any price and must pay anything the owner sees fit to exact, but should be determined and controlled, as far as may be, by a survey of the whole situation, and comparisons, where they can be made, with other properties which are in like maner available.

The right of eminent domain is given to the company for the purpose of preventing the property owner from taking advantage of the necessities of the company as to any particular tract. While it is intended to secure to him its full and fair value for any purpose for which it is best adapted—and to this end an appeal is given to the courts from unrighteous awards—we are not to lose sight of the fact that railroads must be constructed along continuous lines and that the topography of the lands through which the lines are projected has much to do with their availability for railroad purposes and that such availability necessarily and properly enhances their value, for which the owner is entitled to compensation, and so it comes about that properties so available and favorably situated for the purpose have a much greater value than other adjoining or adjacent properties not so conditioned.

The Master is of the opinion that the appraisers of the St. Paul and Minneapolis terminals were fully impressed with their value for railroad purposes and their appraisement, as verified by them before the Master and as modified in the Northern Pacific case, is a generous valuation and should be accepted as full railroad value of the terminal properties and has been by him so accepted with an addition of five per cent to cover cost of acquisition and consequential damages, and which seems ample *71

for the purpose in the large cities. The peculiar location of the properties did not seem to require a large increase on this account.

In Duluth, the appraisers were much more moderate in fixing values and seemed to have adjusted the same with reference to the adaptability of the property for general business enterprises and not to have taken into consideration their special and increased value for railroad purposes. It is determined that their appraisement, increased by twenty-five per cent thereof, all things considered, will fairly cover reproduction cost, and their valuation is fixed at such sum accordingly.

The Master has not overlooked the testimony offered by the State bearing upon these valuations and has given to it such consideration as in his opinion it was entitled to. It is proper to say, however, that it has not impressed him as entitled to much weight. The avowed purpose of the State was to get away from opinion values as much as possible owing to the fact that witnesses are necessarily and unconsciously influenced by the interests of those at whose instance they are called, however fair and unbiased they may intend to be—considerations which the Master in fixing values has kept in mind. To this end the State has not offered the opinion of any witness as to the value of any of these terminal properties,—ignoring, as it would seem, the fact that real estate values are necessarily and largely a matter of opinion when applied to any particular tract or parcel of land. As a substitute therefor the State's engineer and chief witness on this subject has adopted a method,
*72 in each of the three terminal cities, substantially as follows, taking the city of St. Paul as an example:

He ascertained from the records the selling price of genuine sales of land for a period of years, and amounting to a large number, in every part of the city. The selling price of the lands without improvements, so far as this could be ascertained, was compared with the assessed value thereof, and it was found

that on the average the assessed value was about sixty per cent of the selling price of such lands, and from this comparison the market value of the lands for general purposes was ascertained. Then the lands at varying width on each side of the side of the center line of the railroad land to be valued was divided into sections so that the lands in each section, according to his judgment, should be as nearly as practicable of like value, and the assessed value of the lands in such section was obtained and such assessed value was determined to be sixty per cent of the market value of the lands assessed. The market value, or, as he styles it, the "true value" so found was then applied to the railroad lands within the section, and to find their railway value, seventy-five per cent thereof was added to such market value, it having been determined by him that railroad companies have to pay on the average seventy-five per cent more for properties required by them than the market value as so found.

Such, in brief, is the State's method of producing terminal property values, and generally known as the assessment and sales method.

It is conceded that when applied to any particular tract of land it cannot be relied upon, but it is claimed that when applied to extensive contiguous tracts, as are rights of way, the doctrine of averages will bring about reasonably correct results. To make a market value assessment, the assessor could not rely *73
on such methods with respect to any particular tract, but would be compelled to make a personal inspection and determine whether assessment must be reduced or increased and where it stood with reference to such average. We can understand that, for the purpose of equalizing values as between counties where many contiguous sections of land are under consideration and for the purpose of making each county pay its relative proportion of state taxes, such method would be of great value by reason of the broad base for purposes of comparison, but the

relative market value for the counties having been ascertained, then a personal inspection by the assessor would be necessary of each tract assessed to determine whether the assessment must be reduced or increased, that is, whether as previously assessed it was above or below the general average.

The evidence shows that the railroad lands in St. Paul constitute about eight per cent of all the assessed lands in the city, and, distributed among all the railroads owning terminal properties, each has but a very small per cent thereof. These considerations, added to the notoriously gross inequalities of assessments, compel the Master to give little weight to testimony of this character. On the other hand, he does not conceive he is bound to accept opinion testimony as absolute but only as a large determining element in connection with all the facts and circumstances disclosed in the evidence, and this has been done in reaching his conclusions. He has given careful consideration to actual purchases recently made in acquiring property for railroad purposes and cited to show that they substantiate values fixed by the witnesses on either side, for of
*74 course they are of great value for such purpose.

No deduction has been made for street crossings or parts of streets used for right of way held under rights acquired from the respective city authorities without acquisition of the fee. For railroad purposes these rights are substantially as valuable as if held under absolute title. They are permanent in character and in case of reproduction would cost practically as much as private property.

With reference to right of way values outside of terminals, opinion testimony has been submitted by both parties, and, save in the Minneapolis & St. Louis case, there are wide differences between them. They have both used multipliers, generally of three, to cover cost of reproduction over market value. That is, the market value of adjacent lands has been ascertained and applied to the right of way lands and such value multiplied by

three to ascertain what it would cost a railroad company to acquire the property. Whether this multiple has been used in the same manner, having in mind the same basis is somewhat doubtful. In determining such basis the Master believes the witnesses for the complainants have been somewhat expansive, influenced measurably by the increased value for railroad purposes over its ordinary market value for farm purposes, and have used too large a multiplier. At the same time, the testimony of the chief witness for the State is much impaired by the fact that he evidently based his estimates upon valuations as fixed by the complainants' witnesses, of which they are found to be, in some fifty-two villages on the Northern Pacific road, an exact per cent and ranging from twenty to eighty per cent lower than such valuations. (See Exhibit 75—Cooper.) It is not doubted that he made as careful and painstaking effort, *75 within the limited time he was able to devote to the purpose, as was practicable to ascertain and determine the market value of the properties appraised, but the weight of such testimony would have been manifestly greater if valuations had been independently fixed by him without regard to those previously made by the railroad company. At the same time the fact that his values of such property in the Minneapolis & St. Louis case, as also of much other property on that line of railway, were so nearly the same as the value of the chief witness for complainants in that case that they were able to compromise their differences has a tendency to corroborate his values on the other roads.

Upon careful consideration of the evidence and all the circumstances thereby disclosed bearing on the question, seventy-five per cent of the valuations as fixed by complainants' witnesses has been determined upon as the fair reproduction value of the property in the Northern Pacific and Great Northern cases.

Item 2. Grading, clearing and grubbing.

Northern Pacific Case: Amount allowed...$12,331,541.52

After allowance by State for adaptation and solidification placed by it in an item by itself, and by complainants included in this Item 2, the difference between the parties is substantially $850,339.68, and is fully acounted for by inadequate unit prices and insufficient quantities adopted by the State's witness as the basis of his estimate.

Item 2. Great Northern case:

Amount allowed.....$21,685,802.00

Complainant claims for this item $22,155,453, which includes $3,235,022.91 allowed by the State as a separate item
*76 for adaptation and solidification of road-bed and $448,227 for additions to the road after June 30, 1907—to which time only the State's estimates were made. This left a difference between the parties of $1,798,792.85. I have credited the complainant with this difference except items for abandoned right of way, amounting to $135,876, and the further sum of $33,775 for estimate of work not of record. There seems to be no substantial reason for not allowing for the extra work shown by the records and also the usual ten per cent increase on work shown only by profile—a usual allowance for profile estimates and so recognized and accepted by the State's engineer in the Northern Pacific Case. As to unit prices, the weight of evidence in this and the other cases shows that the State's witness in the unit prices used by him failed to allow an adequate amount for extra cost of other than contract work and in this respect unit prices fixed by complainants' witnesses should be accepted.

Item 2, Minneapolis & St. Louis case:

Amount allowed $2,551.690.00

Item 3, protection work, rip-rap and retaining walls.

Northern Pacific case: Amount allowed.... $374,091.53

The State's testimony would very materially increase this amount.

Item 3, Great Northern case:

Amount allowed $850,069.00

It is conceded that as to this item the only difference between the parties is as to the unit prices. In the Northern Pacific case the price of $2 per yard for rip-rap claimed by complainant's witness seems to have been conceded by the State, and no reason appears for the State not conceding it here and *77
insisting, as it does, that only $1.25 per yard should be allowed.

Item 3, Minneapolis & St. Louis case:

Amount allowed $52,240.00

Item 4, Tunnels.

Northern Pacific case: Amount allowed.....$253,250.00

The chief difference between the parties concerning this item is as to the allowance of anything for the Seventh street viaduct, so-called, in the city of St. Paul, constructed by the city after the road was built. The Northern Pacific Company did not construct this tunnel, nor does it appear from the evidence that even under the latest decisions of the courts it could have been compelled so to do. It is, so far as appears, a permanent structure not likely to require repair or replacement; at least the evidence does not disclose to the contrary. It forms an adequate passageway for the movement of trains, as much so as if created by natural conditions, and is substantially different from overhead bridges and like structures which the company could be compelled to reconstruct and maintain and which will require frequent repairs, renewals and replacements. If such were required, it may be assumed, in the absence of testimony to the contrary, that the city would be obliged to do the work and that the company's rights were properly safeguarded when it consented to the construction of a causeway over its right of way.

Item 4, Great Northern and Minneapolis & St. Louis cases. There are no tunnels on these lines in Minnesota.

*78 Item 5, Cross-ties and switch-ties.

Northern Pacific Case: Amount allowed...$3,637,376.70

Accepted as claimed by complainant and includes transportion.

Item 5, Great Northern case:

Amount allowed $3,460,809.00

The complainants have taken as average price of ties 70.3 cents. The price for ties as claimed in the Northern Pacific case, with a larger per cent of high-grade ties, is 67.2 cents, which is deemed fair and is accepted for this case. The State's valuation of 33.3 cents per tie is based upon prices in 1903 and does not allow for inspection and handling. The rapidly increasing price of ties since that time clearly justifies the finding here made.

Item 5, Minneapolis & St. Louis case:

Amount allowed.....$1,149,829.00

The ties on this road were high-grade, oak and cedar exclusively, and the price claimed for same, respectively, 73 cents for oak and 63 cents for cedar, is accepted, being the same as allowed in the Northern Pacific case for such quality of ties. The State found a shortage of 32,000 ties in the number claimed and a deduction is made therefor at 70 cents per tie, it not appearing of what kind the deficiency consisted.

*79 Item 6, Ballast.

Northern Pacific case: Amount allowed $1,960,969.00

This amount is found by taking the same unit price as in the Great Northern case of 62 cents per yard.

Item 6, Great Northern case:

Amount allowed $3,861,360.00

The main difference between the parties is unit prices. A careful analysis of the testimony justifies the prices and quantities claimed by complainants of 62 cents per yard. The State clearly overlooked items of expense in a very considerable amount in the unit prices of 45 cents per yard adopted by it.

Other reliable testimony fixes such prices much higher than those above allowed, while complainant's chief witness, from actual measurements on the ground and records of the company, was best qualified to testify as to quantities.

Item 6, Minneapolis & St. Louis case:

Amount allowed..... $357,855.00

Item 7, Rails.

Northern Pacific case: Amount allowed..$5,645,307.73

This includes handling, inspection and transportation to central points of each section under construction.

Item 7, Great Northern case:

Amount allowed.....$9,053,977.00

The only material difference between the parties after allowance for rails acquired after June 30, 1907, not included in the State's estimate, is in unit prices and here allowed at $30.25 per ton at St. Paul and Duluth. The State's engineer and the engineer in the Northern Pacific case fix this price at $29.75, the former as of June 30, 1907, the latter as of June 30, 1906. Having in mind the difference in time and prices paid by the company in 1908 and the matter of handling and inspection allowed indirectly if at all by the State, $30.25 seems to be a fair average price. Transportation charges to the front is *80 claimed for and allowed in a separate item.

Item 7, Minneapolis & St. Louis case:

Amount allowed..... $1,540,392.00

Item 8, Track fastenings.

Northern Pacific case: Amount allowed.....$727,228.37

This is the amount claimed by complainant. If acquisition after State's estimate was made is excluded, the amount allowed is substantially less than the State was willing to concede.

Item 8, Great Northern case:

Amount allowed $2,087,615.00

The difference in the estimates of the respective parties is $171,146.28, of which $28,800 is due to acquisition after State's

estimate was made. The residue is due to difference in unit prices and those of complainant are accepted as they are based on actual prices paid during the current year and there is nothing in the testimony to suggest that they are improper.

Item 8, Minneapolis & St. Louis case:

Amount allowed..... $258,561.00

Item 9, Switches, frogs and railroad crossings.

Northern Pacific case: Amount allowed..... $303,717.80

The difference between estimates of the respective parties is not large and for the most part arises from additions made after State's estimate was made. If Items 8 and 9 are taken together there is substantial agreement between the parties.

Item 9, Great Northern case:

Amount allowed..... $300,519.00

*81 The State concedes a substantially greater amount if acquisitions after State's estimate was made are added to it.

Item 9, Minneapolis & St. Louis case:

Amount allowed..... $66,807.00

Item 10, Track laying and surfacing.

Northern Pacific case: Amount allowed.....$1,600,591.56

In taking the amount claimed by complainant as the amount allowed the fact is not overlooked that 439.476 miles of road is allowed for at the rate of $1,050 per mile instead of $760 per mile as in the other cases. The latter figure covers only such surfacing as is necessary for ballast and construction trains. In taking the higher figure it is not contemplated that the surfacing will be immediately followed by ballasting, but that it will leave the road in condition suitable for commercial business and that it will be followed by ballasting at some later time. A similar division of work is not found in the other cases, where it seems to be assumed that surfacing will be immediately followed by ballasting to make a completed road ready for operation.

Item 10, Great Northern case:

Amount allowed $2,207,753.00

It is difficult to reconcile the wide differences between the parties in these cases with respect to this item. As a matter of fact it is of such character that there ought not to be great disparity in unit values. In this (the Great Northern case) the State's estimate is based on a cost of $500 per mile, while complainant bases on a cost of $835 per mile, with the items entering into such cost substantially the same. For so-called *82
contract work (that is, labor of handling material and laying track,) the State allows only $275 per mile. It appears from the records of the company (Ex. 7—Hogeland) that as long ago as 1898 in the construction of 150 miles of road in Minnesota the company actually paid $359 per mile for such work—an undertaking sufficiently extensive to be a fair criterion of value. If such was the sum necessarily paid, as the books of the company show—and they are not challenged—it would have cost much more in 1908, $400 per mile being a low estimate. Again, the State allows, in the Northern Pacific case, and presumptively the same in this, only $28.75 for surfacing while in the work referred to in 1898 the company actually paid $142 per mile for such work. This small amount allowed by the State for surfacing was upon the theory that where track laying was to be followed as soon as practicable by ballasting little surfacing would be required. The testimony shows that even in such case it is customary and more economical to do a very considerable amount of surfacing to hold the track and ties in place for ballasting and the construction work to follow. The amount so allowed by the State seems greatly inadequate. For train service the State allows only $61.30 per mile, whereas in the work of 1898 referred to the actual cost was $114 per mile. Taking the difference in time, increased cost and other matters into consideration, it would seem that the complainant's claim in the Northern Pacific case of $760 per mile is fairly

conservative, and is adopted as a proper basis for this item in each of the three cases. Such allowance contemplates that there will be very considerable surfacing from the sides so as to make the road sufficiently permanent and stable for the passage of
*83 ballast and construction trains in the further prosecution of the work but not in condition for commercial traffic.

Item 10, Minneapolis & St. Louis case:

Amount allowed..... $384,751.00

It appears that the company in 1906 and 1907 did work of this character in South Dakota and amounting to 250 miles at a cost of $890 per mile, of which $130 per mile was charged as material-yard expense. Such expense does not appear in the estimates in the other cases, and if in this it is deducted from the total claimed, we have $760 per mile, just the amount allowed in those cases. Whatever may have been the conditions in South Dakota appertaining to this work there done, it does not satisfactorily appear that for the road in this state such expense would be necessary.

Item 11, Bridges, trestles and culverts.

Northern Pacific case: Amount allowed.....$3,586,053.00

Allowing for construction after State's estimate was made, there remains a difference between the parties of $896,072.21. The State bases its figures, apparently, in a large measure upon the reports made of such work by a number of other important railroad lines. Its engineer made use of these reports in making up the estimate in connection with his own very considerable knowledge and experience in such matters—and such estimate is not to be ignored. It is to be observed, however, that reports of other companies not supported by evidence as to basic facts should be received with caution. Exhibit 86—Dar-
*84 ling—discloses the difference between the parties with respect to the items of work making up the total aggregate and actual prices paid for such items in recent years, from which it appears that the unit prices so paid are considerably higher than

those used by the State. Upon careful review of the whole testimony it is determined to allow to complainant on account of this item a sum equal to two-thirds of this difference; that is, State's allowance, $2,578,014, plus new work, $410,658, plus two-thirds of $896,072 equals $3,686,053.

Item 11, Great Northern case:

Amount allowed..... $6,664,729.00

Allowing for construction after State's estimate was made and omissions from it of bridges and, seemingly, also, of foundation work, the difference between the parties is $448,589.44, and is to be accounted for by difference in unit prices. The State's prices are compared with the prices returned by a number of other important railroad lines in the state and seem to have been quite largely based upon or fixed with reference to them, as appears in the Northern Pacific case. For reasons stated in that case there is allowed to complainants two-thirds of the difference on account of this item; that is, state's allowance $5,141,781 plus new work and omitted bridges and foundations $1,223,889 plus two-thirds of $448,587 equals $6,664,729.

Item 11, Minneapolis & St. Louis case:

Amount allowed $1,025,827.00

The difference between the parties on this item is $354,292. Except as to three overhead bridges in Minneapolis, the chief witnesses seemed to harmonize as to quantities. It was claimed by the State that the three bridges mentioned were built by the city and for this reason no allowance was made therefor. But *85
as they apparently form a part of street highways, as the law now is, their repair and renewal as required must be borne by the company and the city could not have been compelled to construct them in the first instance if the law had been properly interpreted and observed. Their reproduction cost should have been allowed at the sum of $54,580. This must be offset by an error in quantities of masonry found by the State's wit-

ness, amounting, at the unit prices reported by the company, to $23,000, which leaves $31,580 to be added to the State's estimate, leaving a difference of $322,712, due apparently to unit prices. For reasons stated in the other case the benefit of two-thirds thereof is given to complainants. State's estimate $799,106 plus $31,580 plus two-thirds of $322,712 equals $1,025,827.

Items 12 to 28, inclusive, and 31 to 34 inclusive.

Northern Pacific case and Great Northern case:

As to the foregoing items in each of these two cases after allowing complainants for acquisition after State's estimates were made, it appears that the total value thereof as conceded by the State exceeds the amount claimed by the complainants who in their brief assume a substantial agreement. It is determined that in the Northern Pacific case the valuation of said items in the aggregate amounts to the sum of $20,272,398.23 and in the Great Northern case to the sum of $28,838,580. The valuations placed on each of the items making up such aggregate valuations, respectively, by the witnesses for complainants, are found to be fair and reasonable and are made part of the sum-

*86 mary schedule to follow. As the aggregate is less than conceded by the State it cannot complain.

Minneapolis & St. Louis case:

In this case there was little difference between the parties as to the items from 12 to 26 and the differences in these and some other items were compromised and figures taken accordingly and appear in the summary to follow. These figures so taken represent the Master's judgment of the fair value of the items respectively.

Item 30, Engineering, superintendence and legal expenses.

Northern Pacific case: Amount allowed....$2,633,946.00

This is 4½ per cent on Item 1 to 28, same as in Great Northern case.

Great Northern case: Amount allowed.... $3,867,040.00

This is obtained by taking 4½ per cent on Items 1 to 28, inclusive, and is sufficient to cover general expenses, for which a separate claim is made.

Minneapolis & St. Louis case: Amount allowed, $690,364.00

For valuation of Items 31 to 34 in this case see summary to follow.

Item 36, Freight on construction.

Northern Pacific case: In this case this item has not been kept separately but is included as a part of the cost of all items requiring such service.

Great Northern case: Amount allowed.....$1,700,043.00

The evidence clearly favors the view that this item should be allowed at regular tariff rates; that it is more economical to make use of other roads as far as possible in handling material *87
to the front and that now full tariff rates must be paid for such service rather than the conventional five mills per ton per mile which seems to have formerly obtained. As the law now is, no favors can be extended to railroad companies or reductions made in the interest of reciprocity.

Minneapolis & St. Louis case:

This and Item 37 are to be taken in connection with Item 39 and is covered by it.

Item 37, Contingencies.

Northern Pacific case: Amount allowed....$3,710,479.00

The amount here allowed is five per cent on Items 1 to 34 and corresponds to the State's method, and in view of present knowledge—making definite many things which would in a road projected into new territory be uncertain—the amount seems ample.

Item 37, Great Northern case:

Amount allowed $4,367,826.00

This amount is obtained by allowing ten per cent on all items

into which labor enters and eliminates items a knowledge of which has been acquired by the actual construction of road. The State's method would have somewhat increased this amount.

Item 38, Stores and supplies in Minnesota.

Northern Pacific case: Amount allowed.... $2,658,976.00

Item 38, Great Northern case:

Amount allowed..... $3,240,178.00

Item 38, Minneapolis & St. Louis case:

Amount allowed $238,589.00

*88 Item 39, Interest during construction.

Northern Pacific case: Amount allowed.... $7,386,215.00

This is interest at four per cent for 2 1-2 years on Items 1 to 36.

Item 39, Great Northern case:

Amount allowed..... $17,880,150.00

This allowance is based upon four per cent on Items 1 to 36 for a period of four years, during which time it is assumed the aggregate of such items would average the amount paid out without a return. It is fair to allow interest on payments made until as the result of such payments revenue is derived, and this is recognized by all the authorities as well as by the State's witnesses. This is an interest allowance, however, and is not analagous to returns based on the hazards of the business, as are rates. Returns from savings banks' accounts and the better class of bonds are less than four per cent, and under all the circumstances interest at this rate seems fairly compensatory and is what is claimed and allowed in the Northern Pacific Case.

Minneapolis & St. Louis case, Items 36, 37 and 39:

Amount allowed..... $1,834,880.00

In view of testimony, ten per cent of Items from 1 to 34, inclusive.

Item 40, Interest in terminal properties.

Northern Pacific case: Amount allowed.... $2,204,342.00

TORN PAGES

The situation of this company with respect to the St. Paul Union Depot and Minnesota Transfer companies is identical with that of the Great Northern company, to be hereafter ex- *89
plained.

With respect to the Duluth Union Depot and Transfer Company, the Northern Pacific Company owns all the stock and makes use of the property of the company as its own by the operation of its line of road; it is simply an operating tool and transacts no business on its own account or otherwise than as an agent of the Northern Pacific Company, and its properties should be valued as belonging to that company.

In this case it was conceded at the close of the argument before the Master that the Big Forks and International Falls Railway and the Minnesota and International Railway had not been made to appear as part of the Northern Pacific system, and they have not been included in the valuations which have been made.

Item 40, Great Northern case:

Amount allowed..... $1,186,191.00

This is the valuation of the one-tenth interest owned by the company in the Minnesota Transfer Railway and of the one-ninth interest in the St. Paul Union Depot properties. Such ownership is not direct but is evidenced by stock in subsidiary corporations in whose name the properties are carried and operated for the sole and exclusive benefit of the respective railroad companies which own the stock and make use of the properties as an operating tool and as part of the properties of their respective lines of railroad. These companies are substantially joint owners of the property and as a matter of convenience and to more readily adjust accounts as between themselves growing out of the several use by each of them as so made of it, an agency for the purposes is created by an intermediary corporation under their direct control. To such agent each pays *90
for such use of the property and charges the amount paid in

its expense account, and dividends, if any, go into the revenue account as operating expenses and revenues.

These subsidiary corporations are mere agencies operated for and wholly dependent upon the railroad companies who own the stock and in no sense are they independent enterprises engaged in business on their own account. In the evidence and all the proceedings before the Master it has been by all parties assumed that such was their character, and this being so the properties thereof should be considered as property of the companies to the extent of their respective interests as represented by stock.

These terminal properties, located as they are and used for receiving and discharging passengers and for receiving, handling, transferring and forwarding freight, are of exceptional value and importance and the facilities so provided are found to be fully worth the amount claimed therefor by complainants and such amount has been taken in each of the cases.

Item 40, Minneapolis & St. Louis case:

Amount allowed..... $1,186,191.00

The interest of this company in the Minnesota Transfer and St. Paul Union Depot property is apparently the same as in the other cases and is allowed for the reasons before stated.

A claim was made in the Great Northern case for lines under construction, but the evidence fails to show why they should constitute an element of rate-making value. Until they become completed roads and are made part of the system so as to produce revenue, they should not be regarded. Upon completion it
*91 will be noted that interest during construction is allowed as an element of reproduction cost, which—when it shall become entitled to recognition—will fully cover the claim so made.

SUMMARY OF VALUATIONS OF PHYSICAL PROPERTIES.

Itemized in each of the three suits.

NORTHERN PACIFIC CASE.

Items.			
1.	Lands for right of way, yards and terminals	$21,024,562	
2.	Grading, clearing and grubbing	12,331,541	
3.	Protection work, rip-rap, retaining walls	374,091	
4.	Tunnels	253,250	
5.	Cross-ties and switch-ties	3,657,576	
6.	Ballast	1,960,969	
7.	Rails	5,645,307	
8.	Track fastenings	727,228	
9.	Switches, frogs and railroad crossings	303,717	
10.	Track laying and surfacing	1,600,591	
11.	Bridges, trestles and culverts	3,586,063	
12.	Track and bridge tools	28,073	
13.	Fences, cattleguards and signs	471,609	
14.	Stockyards and appurtenances	37,098	
15.	Water stations	436,489	
16.	Coal stations	120,039	
17.	Stations, buildings and fixtures	920,423	
18.	Miscellaneous buildings	1,054,874	
19.	Steam and electric power plants, gas plants	196,338	
20.	General repair shops	1,162,934	
21.	Shop machinery and tools	529,322	*92
22.	Engine houses, turntables and cinder pits	1,026,346	
23.	Track scales	38,520	
24.	Docks and wharves	768,306	
25. 26.	Interlocking plants and other signal apparatus,	114,430	

27. 28.	Telegraph and telephone lines	285,145
28½.	General office furniture	73,654
29.	Solidification of roadbed. (Absorbed in above.)	
	Total 1 to 28	$58,728,685
30.	Engineering, superintendence, legal expenses, 4½ per cent 1 to 28	$2,785,036
31.	Locomotives	3,454,040
32.	Passenger equipment	1,349,829
33.	Freight car equipment	7,519,722
34.	Miscellaneous equipment	372,477
35.	Marine equipment (none).	
	Total items 1 to 34	$74,209,789
36.	Freight on construction material—absorbed.	
37.	Contingencies, 5 per cent 1 to 34	3,710,479
38.	Stores and supplies in Minnesota	2,658,976
39.	Interest during construction, 4 per cent 2½ years, Items 1 to 36	7,420,957
40.	Interest in terminal properties, St. Paul depot, Duluth depot, Minnesota Transfer	2,204,344
		$90,204,545

*93 GREAT NORTHERN CASE.

Items.

1.	Lands for right of way, yards and terminals	$25,172,650
2.	Grading, clearing and grubbing	21,685,802
3.	Protection work, rip-rap and retaining walls	850,069
4.	Tunnels (none).	
5.	Cross-ties and switch-ties	5,460,809
6.	Ballast	3,861,360
7.	Rails	9,053,977

8.	Track fastenings	2,087,615	
9.	Switches, frogs and railroad crossings	300,519	
10.	Track laying and surfacing	2,207,753	
11.	Bridges, trestles and culverts	6,664,729	
12.	Track and bridge tools	54,450	
13.	Fences, cattleguards and signs	448,864	
14.	Stockyards and appurtenances	81,600	
15.	Water stations	569,900	
16.	Coal stations	202,200	
17.	Station buildings and fixtures	1,561,200	
18.	Miscellaneous buildings	1,446,445	
19.	Steam and electric power plants and gas plants.	413,752	
20.	General repair shops	1,070,765	
21.	Shop machinery and tools	953,531	
22.	Engine houses, turntables and cinder pits	727,100	
23.	Track scales	39,700	
24.	Docks and wharves	37,500	
25.	Interlocking plants	193,268	
26.	Signal apparatus	116,046	*94
27.	Telegraph lines and appurtenances	634,744	
28.	Telephone lines and appurtenances	37,893	
29.	Solidification of roadbed (Absorbed in above.)		
	Total 1 to 28	$85,934,241	
30.	Engineering, superintendence, legal expenses, 4½ per cent 1 to 28	$3,867,040	
31.	Locomotives	5,469,270	
32.	Passenger equipment	1,886,178	
33.	Freight car equipment	12,411,265	
34.	Miscellaneous equipment	482,909	
35.	Marine equipment (none).		
	Total 1 to 34	$110,050,903	

36.	Freight on construction material	1,700,043
		$111,750,946
37.	Contingencies	4,367,826
38.	Stores and supplies in Minnesota	3,240,178
39.	Interest during construction (4 per cent four years 1 to 36)	17,880,150
40.	Interest in terminal properties	1,186,191
		$138,425,291

*95 MINNEAPOLIS & ST. LOUIS CASE.

Items.		
1.	Lands for right of way, yards and terminals	$5,999,397
2.	Grading, clearing and grubbing	2,531,960
3.	Protection work, rip-rap, retaining walls	32,240
4.	Tunnels (none).	
5.	Cross-ties and switch-ties	1,149,829
6.	Ballast	337,835
7.	Rails	1,540,392
8.	Track fastenings	238,561
9.	Switches, frogs and railroad crossings	66,807
10.	Tracklaying and surfacing	384,731
11.	Bridges, trestles and culverts	1,023,827
12.	Track and bridge tools	27,791
13.	Fences, cattleguards and signs	141,606
14.	Stockyards and appurtenances	55,704
15.	Water stations	80,637
16.	Coal stations	25,682
17.	Station buildings and fixtures	239,434
18.	Miscellaneous buildings	32,901
19.	Steam, electric power and gas plants	58,050
20.	General repair shops	180,388
21.	Shop machinery and tools	101,873

22.	Engine houses, turntables and cinder pits.....	148,303	
23.	Track scales.....	8,421	
24.	Docks and wharves (none).		
25.	Interlocking plants.....	15,674	
26.	Signal apparatus	2,594	*96
27.	Telegraph lines and appurtenances.....	27,109	
28.	Telephone lines and appurtenances (none).		
29.	Solidification of roadbed (Absorbed in above).		
	Total items 1 to 28.....	$14,533,988	
30.	Engineering, superintendence and legal expenses, 4¾ per cent 1 to 28.....	$690,364	
31.	Locomotives	698,163	
32.	Passenger equipment	341,006	
33.	Freight car equipment	1,998,345	
34.	Miscellaneous equipment	86,938	
35.	Marine equipment (none).		
	Total Items 1 to 34.....	$18,348,804	
36.	(Included in Item 39.)		
37.	(Included in Item 39.)		
38.	Stores and supplies	238,589	
39.	Freight on construction material, contingencies, interest during contruction	1,834,880	
40.	Interest in terminal properties.....	1,186,191	
		$21,608,464	

VIII.

DEPRECIATION.

Having thus found the cost of reproduction new of these several railroads properties, the question remains what if anything shall be deducted for depreciation.

It is established that the roadbed is constantly increasing

in value. It becomes solidified, embankments and slopes of
*97 excavations become settled and stable and so the better resist effects of rains and frost. It becomes adjusted to surface drainage and the adjustment is made permanent by concrete structures and rip-rap, and in other ways a roadbed long in use is far more valuable than one newly constructed. On the other hand, everything on and above the roadbed depreciates from wear and weather-stress. The life of a tie is from eight to ten years only. Structures become antiquated, inadequate and more or less dilapidated. Ballast requires renewal, tools and machinery wear out, cars, locomotives and equipment, as time goes on, are worn out or discarded for newer types. A large part of the depreciation, however, is taken care of by constant repairs, renewals, additions and replacements, a sufficient sum being annually set aside and devoted to this purpose, so that this, with appreciation of roadbed and adapation to the needs of the country and of the public served, together with working capital hereinafter mentioned fully offsets all depreciation and renders the physical properties of the road not less valuable than their cost of reproduction new. This conclusion is fully supported by the evidence and also justifies the language hereinbefore cited from the Missouri, Kansas & Texas Railway case, decided by Mr. Justice Hook.

There is another element which may properly be considered in connection with the question of depreciation and as an offset to it. It is necessary that the companies should have on call a large sum of money for the conduct of the business and to meet emergencies. No doubt a large part of it draws a low rate of interest while on deposit in bank, but it must be that
*98 very considerable amounts are idle and unproductive and must be considered as an element of value in the matter of rate-making.

In view of all the foregoing considerations it follows without question that there should be no deductions on account of depreciation.

IX.

STOCKS AND BONDS AS AFFECTING VALUE.

There was produced before the Master reliable evidence as to the average market value of the stocks and bonds issued by the Northern Pacific Company for a period of five years ending April 30, 1908, and then outstanding, such average value amounting in the aggregate to the sum of $509,824,723. (Exhibit 17—Gray.)

The total track mileage claimed by Complainant's Exhibit 2—Darling—is 8,146.45 miles. From this must be deducted 150.65 miles for the Minnesota and International line and Big Forks & International Falls line, improperly included, and also lines in Manitoba under lease and not operated as part of the system, amounting approximately to 300 miles, the exact amount not being definitely shown by the evidence. This leaves 7,695.80 miles. The track mileage in Minnesota is 1,625.20 or substantially 21 per cent of the whole. Taking this per cent of the stock and bond valuation gives $107,063,191, which considerably exceeds the cost of reproduction new, but it must be noted that the value of stock is based on all the assets of the company and is not limited to value of property devoted to public service, and its balance-sheet for the whole system of April 30, 1908 (Exhibit *99
CC—Gray) shows a clear surplus of $52,900,073, while some of its assets, notably the Northwestern Improvement Company stock, is apparently of far greater value than as listed. Assets and property not devoted to public service have not been valued, and as they are a large element in stock valuation it follows that value of bonds and stocks is wholly unreliable and cannot be used in these cases as an element in determining the value of operating property or as a basis for rate-making.

In the Great Northern case, the market value of stocks and bonds was shown to be $452,363,804 (Exhibit 65—Drew). The mileage in Minnesota is about 32.59 per cent of the total mile-

age, so that of this stock and bond valuation the amount to be assigned to Minnesota on a track-mileage basis would be $147,425,363. Of this amount a very considerable sum must be predicated on property not devoted to the public service, thus reducing the proportion assignable to Minnesota mileage.

In the Minneapolis & St. Louis case, the market value of stocks and bonds in 1908 was shown to be $22,006,197, which, apportioned on basis of mileage owned by the company, of which about sixty per cent is in Minnesota, gives a valuation assignable to the State of $13,203,718, or about one-fifth less than the value of property as conceded by the State within Minnesota and thirty per cent less than its value as found by the Master on the reproduction basis.

Stock valuations are subject to great fluctuation from causes wholly foreign to the intrinsic values of properties to be taken as a basis of rate-making and have little commercial stability. It is impossible to determine with any degree of certainty the particular elements which from time to time cause such fluctua-
*100 tions and determine the market value of such stocks and to separate the same from the value of properties devoted to public use and decide what proportions thereof shall be assigned to each. Prof. Henry C. Adams, statistician of the Interstate Commerce Commission, has this to say in respect to stock valuations:

> "This is no place to enter upon a discussion of the nature and classification of different kinds of value, but a word of caution may be allowed in order to guard against an unwarranted use of the figures here submitted. The commercial valuation of railroad property, in so far as it depends on income arising from the sale of transportation, is the result, among other things, of an established schedule of freight and passenger rates, from which it follows that such a valuation cannot be used for determining the reasonableness or unreasonableness of the rates in question. The solution of the rate problem demands a separate valuation of the physical property."

X.

ORIGINAL COST OF CONSTRUCTION.

In the Northern Pacific, the Great Northern and Minneapolis & St. Louis cases a large amount of evidence was produced before the Master for the purpose of showing actual cost of construction of the entire railroad systems from the organization of the original companies and by them and by their successors, the present companies, down to April 30, 1908. This could be shown only by the books and records of the two companies, the Northern Pacific and Great Northern, and in the early history of the original companies these are somewhat obscure and uncertain and, by reason of lapse of time, cannot be verified by other proof. *101

The investment cost, in the Northern Pacific case, amounts to the sum of $369,252,755. In this aggregate is included an item of interest during construction amounting to $4,534,882, which is a proper credit, for reasons before stated.

There is also included items aggregating $24,709,164 for discounts made and commissions paid in disposing of its bonds. This, of course, was a necessary and proper expense of the company, and if required to render an accounting it would be entitled to take credit therefor, just as it would be allowed in an accounting demanded with respect to any other business in which any corporation or private person might be engaged. It cannot be said, however, that it is money which has actually gone into the road, but rather an expense which the company incurs for the purpose of procuring such money. If rate-making is to be based upon actual cost, it would seem that such cost must be measured by the money necessarily expended in producing the construction without regard to whether those undertaking the enterprise have the same or must borrow for the purpose—a matter in which the public has no concern. If

allowed interest during construction on the money invested, more should not be asked; otherwise, the rate would be directly affected by the good credit or otherwise of those undertaking the work. It seems that formerly and down to 1907 the Interstate Commerce Commission permitted a credit for this item of discount but now disallow it.

The total investment of $369,252,755 above mentioned also includes an item of $32,573,036, the basis of which is an item found in an old ledger and noted in Exhibit 28—Gray as "Claims
*102 of old stockholders recognized in reorganization representing net cost in issue of new stock less proceeds of lands, $32,573,-036.15," and for which stock was issued and credit taken therefor. It seems probable that this stock was issued without consideration, and the fact that it was never included in the annual reports to the State, as shown in Exhibit V, tends to discredit it, and as there is no supporting evidence it should be disallowed. With these deductions, the cost of construction account is reduced to $312,243,555.

The Minnesota track mileage, as before stated, is substantially 21 per cent of the track mileage of the whole system and if the above cost were proportioned accordingly the amount assignable to the State is 21 per cent of $312,243,555, or a total sum of $65,571,462. This is considerably less than the valuation of the physical properties as found and makes no allowance for appreciation of property incident to the growth or prosperity of the country in which the company is entitled to share.

In the Great Northern case, the balance-sheet of the company of date June 30, 1908, shows the book valuation of property for the entire system devoted to the public service to amount to the sum of $319,681,815.

Upon production of their books and examination made thereof by the State's accountants this amount seems to be reduced to the sum of $295,401,213 by reason of disallowance of the following items: First, when in 1879 this company's immediate

predecessor, the St. Paul, Minneapolis & Manitoba Railway Company, took over the properties from the latter's predecessor, the St. Paul & Pacific Railroad Company, it seems to have arbitrarily increased the book valuation by $12,126,342. Not unlikely this includes cost of reorganization, taking over from the receiver a bankrupt road and putting it on its feet again under able and efficient management, but for such purpose the amount seems excessive. It may also include enhanced value attaching to property as a going concern under such management. There is no evidence in explanation. *103

Second, discount on sale of bonds, disallowed for reasons before stated, $4,794,867.

Third, difference between cost to the company of the stock of the Willmar & Sioux Falls Railway Company and its par value of $1,500,000, it being included at the latter sum in its investment account, $831,275.

Fourth, actual cost of construction of the Willmar & Sioux Falls railroad was less than as included in investment account by $55,950.

Fifth, in the matter of the Eastern Railroad of Minnesota the book valuation or cost exceeds the actual cost of acquisition of Superior terminals and stock of Lake Superior, Terminal & Transit Company and of acquisition of the Duluth, Mississippi & Northern Railroad in the sum of $4,961,426.

Sixth, the book valuation or cost of stock of Duluth, Watertown & Pacific railroad exceeds the actual cost to the company in the sum of $724,161.

Seventh, the excess of book value over actual cost of Wadena & Park Rapids line, the Alton & Halstead line and the Red Lake Falls line amounts to $286,581.

Eighth, book valuation of Minneapolis Union Railway line when taken over was arbitrarily increased in the sum of $500,000.

*104 Total book valuation, as before stated, $319,681,815; total of deductions as above, $24,280,602; balance, $295,401,213.

In explanation of some of the foregoing deductions it is to be kept in mind that as to acquired roads the question is not what it cost the company to take them over but what money has actually gone into their construction.

The total track mileage of the road's entire system is 8,528.98 miles, and of the part in Minnesota 2,779.30 miles, so that practically 32.59 per cent is in this state, and taking this per cent of $295,401,213 we have $96,271,255 as the book value of what has actually been expended in construction and equipment of the road in Minnesota. Of course division on a mileage basis is for the most part arbitrary and unreliable.

In the Minneapolis & St. Louis case, the book cost of property and investments amounted to $30,572,619. Deducting for discounts disallowed for reasons before stated leaves a remainder of $28,574,225. Dividing this on a mileage basis 59.94 per cent, assigns to Minnesota $17,127,390, and apportioned on a gross revenue basis over the entire system, 77.41 per cent assigns to Minnesota $22,119,307.

For reasons before stated, rates are not to be predicated on original investment. Prof. B. H. Meyer, of the Wisconsin University, an eminent railroad statistician who has given the matter very careful consideration, as appears from the so-called Wisconsin Buel rate case, in which he wrote the decision of the commission, says:

> "Bearing in mind, however, that this is a commercial valuation, it is impossible to advance a single valid argument in favor of the acceptance of cost accounts as the
*105 equivalents of values. It would be nearer the truth to say that costs of railway properties have nothing to do with their values than to assert that the values of railway properties are identical with costs."

And again,

> "The method which satisfies in the highest degree the requirements of the valuation of railway systems as a whole as well as the distribution of the total values of such systems among states is the inventory method. This is a composite method, each constituent element in which is designed to solve one phase of the general problem of valuation and value distribution. The basal principle of the method is an engineer's estimate of the cost of reproduction of all physical properties new and in present condition, the latter being usually expressed in terms of per cent of the former."

Again he has said,

> "The cost-of-reproduction method carries with it a greater degree of demonstrable certainty and conviction than all the others which have been proposed."

And again,

> "Value of a railroad property, ascertained by the stock-and-bond method alone, cannot be used with fairness to carriers in cases involving important reductions in their rates."

The Minnesota Railroad & Warehouse Commission in its report to the legislature which resulted in authority to incur the expense necessary to obtain the inventory appraisement made by it sets out very forcibly the value of such appraisement as an element of rate-making. It says: *106

> "It is uniformly held that the cost of reproduction is one of the very important elements in determining what is a reasonable rate and certainly is the strongest kind of evidence of the fair value of the property. The Commission has always recognized the carrier's right to earn a reasonable return on a fair valuation of its property, and has always had this in mind in every rate adjustment it has made. The valuation will be of great value in sustaining the Com-

mission and the legislature in pending legislation should the contention be made that the rates in controversy will not produce a fair return on the property used, and it can be used in any further readjustment of rates that the Commission may deem it advisable or necessary to make."

The Master is thus confirmed in his opinion that the cost of reproduction new is the fairest and most equitable basis upon which to predicate rates, both for the carrier and the public, and he has accordingly adopted it in these cases.

Good will and corporate franchises are not proper elements of such valuation. Patronage and good will of the public are its contributions to the success of the enterprise, for which it is not to be assessed. Corporate franchises are the free gift of the government conferred upon any organization willing to embark in such undertaking, but knowledge derived from experience, adaptation to the needs of the public and readiness to serve, together with physical appreciation of roadbed and a reasonable amount of working capital always on hand for immediate use, are matters of value which will fully offset depreciation arising from use and weather-stress.

*107

XI.

ROADS CONSTRUCTED AND MAINTAINED PURSUANT TO PUBLIC DEMAND.

It is true of these lines of railway that they are efficiently, economically and honestly managed; that they have been located and constructed pursuant to a public demand and that the public rather than dispense with the service of any of them can well afford and will gladly pay such rates as will produce a full and fair return on cost of their reproduction—such return as others engaged in business of similar character and of like hazards and uncertainties are accustomed to receive, and rates sufficient-

ly high for such purpose would not be burdensome, unjust or unreasonable.

Abandonment of either of these roads would be a great public calamity, and if we could conceive of their being suddenly obliterated, their immediate reconstruction would follow in response to the public necessity, which shows that they must be worth what it would cost to reproduce them and that a return based on such cost will not be oppressive.

It is to be observed, however, that there is a marked difference in some respects between the location and surrounding conditions of the Northern Pacific and Great Northern roads, on the one hand, and the Minneapolis & St. Louis road, on the other. The former lines extend from the Head of the Lakes at Duluth and Superior and from the great commercial cities of St. Paul and Minneapolis to important seaboard cities on the Pacific coast and throughout their length, both within and beyond the state of Minnesota, connect with other important lines of railroad and exchange traffic therewith in large volume, and also have many and important branch lines reaching out into productive agricultural lands which operate as feeders and *108
largely increase the business of the main lines. Their terminals at the Head of the Great Lakes and at the Pacific coast bring about the exchange of a large tonnage with vessels navigating those waters, both domestic and foreign, and add largely to the volume of business.

The Minneapolis & St. Louis road, on the other hand, however, is so located that it cannot participate in these advantages and must largely depend on local and inland traffic for its business. It runs south from the inland cities of St. Paul and Minneapolis to Des Moines, with a branch to Storm Lake, Iowa, and a branch to the South Dakota grain fields. Along its entire line it comes in sharp competition with strong intersecting railroad lines, and, while as before stated, it subserves a useful public purpose and is operated in response to public demand, it can

be maintained only by the exercise of the highest economy and watchfulness in its operation and to succeed must be given greater latitude than is necessary with respect to the more favorably located and prosperous lines of railway. Necessarily, to get business its rates must conform to those existing on other roads wherever competition is an element, but when this does not exist it is entitled to rates not so controlled by competition, and within reasonable limits must, to exist, be given a free hand in the conduct of its business, as will later be made to appear when the consideration of rates is reached.

XII.

ECONOMY OF MANAGEMENT.

It has been urged before the Master with reference to the lines of railway under consideration that the evidence discloses
*109 want of economical management in that limited portions of the business were unremunerative and not infrequently resulted in loss.

If the convenience and demands of the public were disregarded, greater economy could doubtless be exercised. Full cars and long trains at fewer intervals would be a great saving of cost, and to this end produce could be stored in elevators awaiting shipment under the most economical conditions. Needless to say that this would result in great public inconvenience and dissatisfaction, and recourse to such methods is unthinkable. The carrier must properly yield to public demand and recoup for loss on other portions of its business.

It is also urged that as to some of the roads surplus lands and equipment are disclosed much beyond present needs. But it is good business sense to anticipate and prepare for the requirements of the near future. Readiness to serve is of the highest importance to those requiring service and an efficient

management will, if practicable, take advantage of the markets and buy what will soon be needed when it can be obtained at a reasonable price and not wait until it *must* be had regardless of cost. Present patrons are not to be burdened for the benefit of those to be acquired in the distant future, but they can well afford to pay a somewhat higher rate that they themselves in the near future may enjoy a cheaper and better service. It is proper for the carrier not only to provide itself with ample facilities for the efficient conduct of its present business, but also to anticipate demands soon to be made as the country becomes more prosperous, and it is entitled to revenue sufficient for such purpose.

Having these considerations in mind, it does not appear that *110
the service rendered or the property acquired and held for present and prospective needs are unreasonable or excessive or that any property has been improperly included as a basis of cost of reproduction for rate-making purposes.

XIII.

VALUATIONS OF ENTIRE SYSTEM.

Complainants have offered considerable testimony for the purpose of establishing value of the physical properties of the whole system, both in the Northern Pacific and Great Northern cases, and they ask a finding of such valuation.

The State has confined its testimony as to value of such physical properties only as are in Minnesota. The Master does not consider a finding in the matter at all necessary in determining the controversies submitted to him, but as such finding is desired by complainants he concludes to make it.

In the Northern Pacific case there was testimony to the effect that the cost of reproduction of the physical properties of the entire system would amount to the sum of $526,779,016. This

includes $28,913,981 for the Spokane, Portland & Seattle road, one-half of which is owned by the Northern Pacific Company and one-half by the Great Northern Company, the amount so taken being one-half of such cost. This road was, at the time evidence was submitted, under construction, did no commercial business, earned no revenue, and until completion could form no part of the operating system. When completed its cost of reproduction will be enhanced by interest during construction and until then
*111 it forms no part of rate-making valuation. It is not included in the track mileage of the system hereinbefore found to amount to 7,693.80 miles.

There is also included in complainants' estimate the further sum of $4,116,874 for the Minnesota and International and the Big Forks and International roads which, for reasons before given, must be deducted.

There has also been so included the further sum of $7,000,000 for lines in Manitoba which are under leases and form no part of the company's operating system.

Eliminating these items leaves a balance of $486,738,161.

Assuming, as we may, that there should be at least the same per cent reduction for the whole system as it has been found necessary to make in Minnesota (which after deducting as here for the Minnesota & International and the Big Forks & International Falls lines was substantially seven per cent), the valuation amounts to $452,666,489, and upon the testimony produced the cost of reproduction is found to amount to this sum.

In the Great Northern case, there was testimony to the effect that cost of reproduction for the entire system would amount to $349,233,317. Deducting for its interest in the Spokane, Portland & Seattle line $21,827,321 and for lines under construction $8,219,581 leaves a balance of $318,206,215.

Assuming, as in the Northern Pacific case, that there should be the same per cent of reduction for the whole system as it has been necessary to make in Minnesota, and which is substantially

12 per cent, the valuation amounts to the sum of $457,121,469, and upon the testimony before the Master the cost of reproduction of the whole system is found to amount to this sum.

*112

XIV.

DIVISION OF PROPERTY VALUATION BETWEEN FREIGHT AND PASSENGER BUSINESS, STATE AND INTERSTATE.

A common use in general is made of the property devoted to the public service for both the freight and passenger business, both state and interstate, respectively, and in making a statement with reference to each class so as to determine revenue with respect to cost, there must be a division of property valuation on some fair basis and an assignment to each of its proper proportion, so that each may carry its proper share of property expense.

It is inequitable that the traveling public, largely on pleasure bent, should cast any part of the expense it incurs on the freight business which has to do almost altogether with traffic in which the public as a whole is directly interested.

On the other hand, it has never been claimed that the latter should be relieved at the expense of the former, and the cases all recognize the propriety of separation upon an equable basis as near as may be.

Furthermore, to determine what net revenue is derived from intrastate business and the per cent of return upon property used in that class of business, it becomes necessary to make a subdivision of property values and determine what part thereof should be assigned to state and to interstate business, respectively. The revenues from each class of business within and properly assignable to the state are known and the amount

thereof and the separation as between states accepted by both
*113 parties and are practically free from estimated approximations.

Of course, any division of property value between the two classes of business, freight and passenger, must be an approximation, but one made on the relation of gross revenue derived from each kind of business has been uniformly accepted as the fairest, all things considered, in all rate cases heretofore judicially determined. While a division of property valuation on the relation of cost has been suggested by defendants, it was practically conceded to be as open to criticism as that made on the basis of revenue. Relative cost as hereafter found is at best a rough and unsatisfactory approximation, necessarily inaccurate, and should not be accepted as a divisional basis if it can be avoided. The revenue basis is not ideal, but it has an element of certainty possessed by no other and is not more objectionable in other respects.

There is no controversy between the parties in the Northern Pacific and the Minneapolis & St. Louis cases as to the total revenue and the part thereof assignable to state and interstate business respectively. In the Great Northern case there is some difference in this respect between the parties, but if the claim of defendants was allowed, it would not in any manner alter the judgment herein recommended to be entered.

A division of total value between freight business and passenger business, state and interstate, on the gross earnings basis in each of the three cases may be stated as follows:

*114 NORTHERN PACIFIC CASE.

Division of Total Value Between Freight Business and Passenger Business on Gross Earnings Basis.

The total value of the property of the Northern Pacific Company, used in the fiscal year ending June 30, 1908, in the conduct of its transportation business in Minnesota, was $90,204,545.

Such total value may justly and fairly be apportioned between freight business and passenger business on the basis of gross earnings,—that is, assign to each such percentage of total value as the amount of the gross earnings of each bears to the total gross earnings of both.

Total gross earnings from freight business and passenger business, including miscellaneous earnings of each, was in said year $13,336,046.87.

Gross earnings freight business, including miscellaneous (consisting of switching, demurrage, storage, etc.) $9,823,508.35 equals *73.661 per cent of total.*

Gross earnings passenger business, including miscellaneous (consisting of mail, express, excess baggage, etc.) $3,512,538.52 equals *26.339 per cent of total.*

73.661 per cent of total value ($90,204,545) assigns $66,445,570 to the freight business, and 26.339 per cent of total value assigns $23,758,975 to the passenger business.

Division of Value Apportioned to Freight Business, Between Intrastate Business and Interstate Business on Gross Earnings Basis.

The total freight earnings, including miscellaneous, in Minnesota for the fiscal year ending June 30, 1908, amounted to *115
$9,823,508.35, of which $1,606,771.26, or 16.356 per cent thereof, was intrastate, and $8,216,737.09, or 83.644 per cent, was interstate.

16.356 per cent of total value apportioned to freight business ($66,445,570) assigns $10,867,837 to the intrastate freight business, and 83.644 per cent of such total value apportioned to the freight business assigns $55,577,733 to the interstate freight business.

Division of value apportioned to Passenger Business between Intrastate Business and Interstate Business.

The total gross passenger earnings, including miscellaneous, in Minnesota for the fiscal year ending June 30, 1908, amounted to $3,512,538.52, of which $1,206,333.09, or 34.344 per cent thereof, was intrastate and $2,306,205.43, or 65.56 per cent thereof, was interstate.

34.344 per cent of the total value apportioned to the passenger business ($23,758,975) assigns $8,159,782 to the intrastate passenger business, and 65.656 per cent of such total amount apportioned to the passenger business assigns $15,599,193 to the interstate passenger business.

*116 SUMMARY OF APPORTIONMENT OF TOTAL VALUE TO THE DIFFERENT CLASSES OF BUSINESS IN MINNESOTA.

Total value of property used in transportation business in Minnesota, for the fiscal year ending June 30, 1908	$90,204,545
Total value apportioned to freight business, 73.661 per cent, or	$66,445,570
Total value apportioned to passenger business, 26.339 per cent, or	23,758,975
Total	$90,204,545

(Equals 100 per cent.)

Assign to intrastate freight business 16.356 per cent of total value apportioned to freight business	$10,867,837
Assign to interstate freight business 83.644 per cent of total value apportioned to freight business	55,577,733

Assign to intrastate passenger business in Minnesota 34.344 per cent of the total value assigned to passenger business 8,159,782

Assign to interstate passenger business in Minnesota 65.656 per cent of total value assigned to passenger business in Minnesota 15,599,193

Total $90,204,545

GREAT NORTHERN CASE.

Division of Total Value Between Freight Business and Passenger Business on Gross Earnings Basis.

The total value of the property of the Great Northern Company used in the fiscal year ending June 30, 1908, in the conduct of its transportation business in Minnesota, was $138,425,291.

Such total value may be justly and fairly apportioned between freight and passenger business on the basis of gross earnings—that is, assign to each such percentage of total value as the amount of gross earnings of each bears to the total gross earnings of both. *117

Total gross earnings from freight business and passenger business, including miscellaneous earnings of each, was in said year..... $20,275,907.75

Gross earnings, freight business, including miscellaneous (consisting of switching, demurrage, storage, etc) 15,936,998.85

(Equals 78.6 per cent.)

Gross earnings passenger business, including miscellaneous (consisting of mail, express, excess baggage, etc) 4,338,908.90

Equals 21.4 per cent.

(See Ex. 30, Parker, 49 Martin and 53 Ward.)

78.6 per cent of total value ($138,425,291) assigns $108,802,-279 to the freight business, and 21.4 per cent of total value assigns $29,623,012 to the passenger business.

Division of Value Apportioned to Freight Business Between Intrastate Business and Interstate Business on Gross Earnings Basis.

The total freight earnings including miscellaneous in Minnesota for the year ending June 30, 1908, amounted to $15,936,-998.85, of which $2,408,421.43, or 15.112 per cent thereof, was intrastate, and $13,528,577.42, or 84.888 per cent thereof, was interstate.

15.112 per cent of total value apportioned to freight business ($108,802,279) assigns $16,442,200 to the intrastate freight business, and 84.888 per cent of such total value apportioned to the freight business assigns $92,360,079 to the interstate freight business.

*118 *Division of Value Apportioned to Passenger Business Between Intrastate business and Interstate Business.*

The total gross passenger earnings, including miscellaneous in Minnesota for the year ending June 30, 1908, amounted to $4,338,908.90, of which $2,086,276.68, or 48.083 per cent thereof, was intrastate, and $2,252,632.22, or 51.917 per cent thereof, was interstate.

48.083 per cent of the total value apportioned to the passenger business ($29,623,012) assigns $14,243,633 to the intrastate passenger business, and 51.917 per cent of such total amount apportioned to the passenger business assigns $15,379,379 to the interstate passenger business.

SUMMARY OF APPORTIONMENT OF TOTAL VALUE TO THE DIFFERENT CLASSES OF BUSINESS.

Total value of property used in transportation business in Minnesota for the fiscal year ending June 30, 1908	$138,425,291
Total value apportioned to freight business, 78.6 per cent or	108,802,279
Total value apportioned to passenger business, 21.4 per cent or	29,623,012
Total, 100 per cent	$138,425,291
Assign to intrastate freight business 15.112 per cent of total value apportioned to freight business	$16,442,200
Assign to interstate freight business 84.888 per cent of total value apportioned to freight business	92,360,079
Assign to intrastate passenger business in Minnesota 48,083 per cent of the total value assigned to passenger business	14,243,633
Assign to interstate passenger business in Minnesota 51.917 per cent of total value assigned to passenger business in Minnesota	15,379,379
	$138,425,291

MINNEAPOLIS & ST. LOUIS CASE.

For this case see infra XVII, p. 127, where it is considered separately.

*119

XV.

REASONABLE RETURN.

Having made the foregoing distribution of property valuations, the question is, What return are the companies respectively entitled to receive thereon without legislative interference for the protection of the public?

It has been found that a full and fair return, such as is derived from investments in like kinds of business and subject to like conditions, would not compel the public served to pay an unjust or burdensome rate. It follows, therefore, that such valuation is as much an element of rate-making and is entitled to the same consideration as are the operating expenses of the company. The theory that it is entitled to some return, the amount thereof to be adjusted by the legislature regardless of property values devoted to the public service, must be rejected. Any rate which will not produce a full and fair return is unreasonable, and is confiscatory to the extent that it comes short of producing such return, and is a taking of property from the carrier class and giving it to the persons served without compensation.

What is a just return? One of the most fair-minded and intelligent witnesses before the Master; one who from his long official experience and efficient service had necessarily given the matter very careful consideration, was of the opinion that the carrier should be assured an average annual return of seven per cent on a fair valuation of its property. The Master concurs in this view. Having in mind the nature of the business, its
*120 fluctuations from year to year due to extremes of weather and varying crop conditions, the fact that operations can never be suspended, but in time of adversity as well as of prosperity the carrier must be ready to serve or forfeit its property devoted to the public service, and that competition is ever present and increasing, it would seem that the return here suggested would be

the minimum when compared with returns from other kinds of business not subject to such conditions. It must be remembered also that the public demands and is able and willing to pay for a service of the highest efficiency, requiring able and skillful management. The continued prosperity of the country depends upon it, and the returns from such undertakings should be sufficiently adequate to encourage the investment of ample capital for their successful prosecution.

In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, the question as to the reasonableness of the rates prescribed by the state of New York for the defendant company within the city of New York was before the Court for its determination. After making some general observations as to what compensation public service corporations would, under varying conditions, be entitled to receive, the Court uses the following language:

> "In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum. It is a corporation, which in fact, as the court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the city of New York would, for purposes of making competition, permit the streets of the city to be *121
> again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply. And, so far as it is given us to look into the future, it seems as certain as anything of such a nature can be, that the demand for gas will increase, and, at the reduced price, increase to a considerable extent. An interest in such a business is as near a safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time that there is a possible element of risk, even in such a business. The court below regarded it as the most favorably situated gas business in America, and added that all gas business is inherently subject to

many of the vicissitudes of manufacturing. Under the circumstances, the court held that a rate which would permit a return of six per cent would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the city of New York.

"Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use."

If a gas company under the conditions there disclosed, with an assured revenue beyond all reasonable probability of hazard, was entitled to six per cent net return on the value of its property devoted to the public use, a finding that in these cases the
*122 companies are entitled to seven per cent net return on such valuation after allowing for all necessary repairs and replacements is certainly conservative and does no injustice to the public. Few businesses are so free from hazard as that of national banks, and the evidence discloses that the average results of their business for thirty-eight years ending with 1907 shows net annual earnings to capital and surplus of 8.58 per cent, and for the period from March 1, 1897, to June 30, 1907, of 9.84 per cent.

The Master determines that under the conditions disclosed in these cases the companies are entitled to a net return of seven per cent upon the value of their property as herein found.

XVI.

NET REVENUE DERIVED FROM FREIGHT AND PASSENGER BUSINESS, RESPECTIVELY.

It now becomes necessary to determine the net revenue derived from the passenger and freight business, respectively, within the state of Minnesota, and to do so we must ascertain

the cost in each class. It has been hereinbefore determined what the gross revenue derived from each class of business and apportioned to the state is, and there is no substantial controversy as to the gross aggregate cost incurred in conducting both classes of business taken as a whole, nor as to the apportionment thereof to the state. *123

Because of the fact that there is a common use of the property in conducting each class of business, it is impossible to apportion to each with any degree of accuracy its proper proportion of cost so that neither shall be unduly burdened, and as to this matter the parties are far apart, both as to results and as to methods in obtaining them, in both the Northern Pacific and Great Northern cases.

In the two cases last above mentioned, the allocations of cost made by the companies respectively have been accepted by both parties. That is to say, each company has assigned to the passenger business all those items of cost directly incurred in conducting that class of business and not common to both classes, and has assigned to the freight business all those items of cost directly incurred in conducting that class of business and not common to both classes, which assignments are accepted by both parties, and the items thereof are called allocated items and cover about sixty per cent of all expenses. The remaining items of cost not so allocated and which are common to and are incurred in conducting both freight and passenger business, are not capable of separation and assignment to each class except upon some more or less arbitrary basis, and approximations only are attainable. Such items by both companies have, in general, been divided and assigned to passenger and to freight business, respectively, upon the relation, as to most of them, which the revenue train-miles in the one class of business bears to the revenue train-miles in the other class of business, and to the items not so divided, upon the relation which the revenue engine-miles in the one class bears to the revenue

*124 engine-miles in the other, and this division and assignment has been accepted by the complainants and they have offered much testimony in support thereof in these two cases.

The division so made of such common items of cost between freight and passenger for the year ending June 30, 1908, in the Northern Pacific case is found in Ex. 79–Elliott, and the method pursued is fully explained by the assistant comptroller, Johnson, in his testimony found in Vol. 6, at pages 3249, et seq., of the printed Record in that case. A like division in the Great Northern case is found in Ex. 47—Martin, with explanations by the assistant comptroller, Martin, of the method pursued, in Vol. 2, at page 955 of the printed Record in that case. The method is the same in both cases and is the one now, and which for many years last past has been, in general use upon all the leading railroads of the country when any attempt at such division is made, constituting, in mileage at least, about one-third of all the lines of railway in the United States. A division of this character was at one time required by the Interstate Commerce Commission, and the foregoing method was the one prescribed for the purpose. Such requirement was subsequently withdrawn and such division of cost between freight and passenger seems to have been quite generally abandoned, but many companies, for their own use and information, continue to make such division according to this method, which would seem to have been the outgrowth of practical observation and experience in the exercise of an honest judgment. When it was originally adopted, there was no apparent reason, from
*125 interest or otherwise, for unduly burdening either class of business with more than its proper share of common expense. Its use is approved and supported by the evidence of a number of witnesses having an intimate knowledge and large experience in the practical operation of railway transportation in all its details.

The method of division presented by the evidence on behalf

of defendants is one devised by their accountant, Mr. C. W. Hillman, and may be styled the Hillman method. There is no difference between the parties in the division of train movement items, being items from 10 to 27 in the schedule of items used by them. The difference arises with respect to the rest of the items contained in such schedule, and they are for the most part divided by Mr. Hillman, item by item, in accordance with his individual judgment and opinion as to the propriety of such division. No other witness was called in support of his method of division, nor does it appear that his experience was such in the practical operation of a railway as to specially qualify him for the work. He is certainly an able accountant and statistician, but could not be classed as a practical operating man. It seems to the Master that the weight of evidence fails to sustain his method. In the Northern Pacific case, for the fiscal year ending June 30, 1907, it results in taking something over $400,000 from the passenger and adding it to the freight expense, and in the Great Northern case, for the fiscal year ending June 30, 1908, it in like manner affects the relation of passenger to freight expense in the sum of $933,694. Manifestly no one else, proceeding along the same lines that Hillman did but exercising his own individual judgment as to what, with respect to each item, was a proper division, would have reached the same results obtained by Hillman, except as a mere coinci- *126
dence. It was conceded that the method could be made to produce any result desired by the person making use of it unless every step taken by its author, varying from time to time according to conditions, were strictly followed.

If the views of the Master as to what is a reasonable rate of return, and his valuations, are accepted and approved, the Hillman method, both as to division of freight and passenger, and his methods of determining the per cent of return on state business, would not, if adopted, change the decree to be entered, either in form or substance. It would, however, make a wide

spread between the per cent of return from each class of business, so wide as to itself suggest that the division made by him was an improper one, greatly favoring, as it does, the net revenue from passenger business. The Master determines that the method of division of common cost between the freight and passenger business made by the Northern Pacific Company and the Great Northern Company with respect to the traffic on their respective roads most nearly approximates an accurate result, and the same is adopted for the purpose of division in the Northern Pacific and Great Northern cases.

In the Minneapolis & St. Louis case a division of cost between freight and passenger business was made by the company upon a combination of train, car and engine-mileage, with results so close to those produced by the Hillman method that they were accepted by the defendants.

The results of divisions of cost between freight and passenger and resulting net revenue will appear later in this report.

*127

XVII.

NET RETURN FROM INTERSTATE PASSENGER AND FREIGHT BUSINESS ON PROPERTY VALUATIONS ASSIGNED TO EACH RESPECTIVELY.

Northern Pacific Case.

Great Northern Case.

In the two cases mentioned in the caption of this subdivision we now have the following definitely ascertained elements for determining net return in the two classes of business, viz.:

1st. Gross revenue from state and interstate business, both freight and passenger, respectively, separately stated;

2nd. Relation of revenue per ton per mile and per passenger per mile, respectively, state to interstate;

3rd. Gross cost of operation, covering and being an aggregation of cost of state and interstate business, freight and passenger;

4th. The division of cost between the freight and passenger business as herein found and determined.

The element not certainly known and which must be ascertained and determined from the evidence is the relation of cost, state to interstate, in each class of business, freight and passenger. This found as to passenger-miles and ton-miles respectively, and the problem of determining the net revenue from each class can be readily solved.

It is needless here to recount the difficulties this problem presents, growing out of the common use of the same property in contemporaneously conducting both state and interstate transportation. They have been often recited with much particularity in railway rate decisions and are again fully described by experienced railway officials and employes called as witnesses in these cases, and their testimony more than justifies a sugestion made by Judge Van Devanter in response to some inquiry of counsel when orally delivering his opinion in St. Louis & C. R. Co. v. Allen, in the course of which he made use of the follow- *128
language, viz.:

> "Taking as your premise that the authority of Congress is supreme and therefore in respect of interstate commerce its authority shall be everywhere equally dominant, I am not sure but that the result would be in some instances where there is such a confusion, such an interweaving, as that there could not be a separation, that there the power of Congress would be the dominant power and that the other power would not exist; not on the theory that Congress has any authority over state rates, but that since its authority over interstate commerce must reach in every part and parcel of it, Congress must say that anything that gets interwoven with it must partake of the

exercise of that authority. Otherwise the power of Congress, which is supreme, would not be supreme."

It is conceded by all that there is practically no difference in cost arising from the fact that a transportation is across a state line and not wholly within the state, and there is no dis-
*129 pute but that a substantial difference exists in the cost of doing the short-haul and the long-haul business. This is clearly evidenced, in the freight business, by all rate tariffs, including the schedules of rates prescribed by the Commission's orders and the Commodity Rate Act which gave rise to these suits. The orders covering merchandise rates make the hauling charge for the first two hundred miles twice as large as for the second two hundred miles, and four times as large as for distances beyond the four-hundred-mile point, and a similar relation exists in the legislative commodity rates. There is, of course, some state traffic having a reasonably long haul and some interstate traffic having a short haul, but by far the greater volume of state business belongs to the more expensive short-haul class, and in the interstate business by far the greater part thereof belongs to the less expensive long-haul class. This is established by the fact that in the Northern Pacific case, for the year ending June 30, 1908, as the evidence shows, there were 960,709,494 ton-miles of interstate traffic touching Minnesota, with an average haul of 485.3 miles as against 130,580,988 ton-miles of state traffic with an average haul of only 104.52 miles. (Ex. 80—Elliott.)

In the Great Northern case, for the year ending June 30, 1908, the evidence shows 1,952,426,967 ton-miles of interstate traffic touching Minnesota, with an average haul of 411.8 miles, as against 171,317,766 ton-miles of state traffic with an average haul of only 113.3 miles. (Ex. 53—Ward.) State traffic is always burdened with the expense of two terminals within the state, whereas interstate traffic very generally is charged with
*130 the expense of but one terminal, and as to overhead or transstate shipments in carload lots, as is a very considerable part of

the business, no such expense is incurred beyond the comparatively small yard expense in the making up and handling of through trains.

Doubtless the most marked difference in transportation cost depends upon whether the freight handled is through or local with respect to the several operating divisions of the line. That is, freight hauled over less than one division on local or peddling trains, as they are called, is known as local freight, and freight hauled over one or more divisions on through trains is known as through freight on such divisions, and this without reference to whether it is state or interstate traffic. A divisional distance consists, in general, of from about 110 to 150 miles, the same constituting an engine-run. There is, of course, some intrastate traffic which moves on through trains, but the greater part thereof is local freight. There is also a considerable amount of interstate traffic which moves on local trains, but by far the greater part thereof is through freight, as is shown by the long average haul. It is also true that local trains often carry through freight and through trains carry local freight in order to secure the most efficient and economical operation.

In view of these and all other conditions attending transportation, as disclosed by the evidence, entering into the question of relative expense, it becomes a difficult matter to determine with any degree of certainty the relation of cost per ton per mile in transporting state and interstate freight respectively, the expense of which is practically all common to both *131
and not subject to allocation. The complainants have produced as witnesses before the Master a very considerable number of able and competent operating men, intimately acquainted with and having a wide knowledge of all the details of railway transportation derived from long personal experience in conducting such business. Their testimony is to the effect that it costs from three to seven times as much per ton per mile to do the intrastate freight business as to do the interstate freight

business, and that it costs from twenty-five to fifty per cent per passenger per mile more to do the state passenger business than to do the interstate passenger business. The defendants concede that there is greater cost attending the doing of state business, both passenger and freight, but insist that this increased cost is largely, if not wholly, taken up by the increased revenue per ton and per passenger per mile derived from the state traffic. Their chief reliance is upon the evidence of their expert accountant Mr. Hillman, before mentioned, by the use of whose method, similar in many respects to that devised by him for dividing common items of cost between freight and passenger, in connection with his testimony in support of such method they have endeavored to establish their claim. The tables presented by him as a basis of his testimony are for most items of cost the result of his own personal judgment and opinion, and as to some of them upon which his results are predicated there have been certain material assumptions not justified by the conditions found to exist. Here, too, it is conceded that any material difference of opinion as to division—as there would most likely
*132 be with regard to some, if not many, of the items—would effect very substantially different results. Another matter tending to discredit the Hillman method is the wide spread in operating per cent between state and interstate business of some of the companies and the low operating per cent as to state business on some lines as compared with that on others and as compared with the operating per cent generally found to exist on all lines of all business done in the country. Operating per cent is the per cent of gross revenue absorbed by cost of operation, and if we may take the statement of counsel in one of the briefs for defendants, (and it would seem to be a matter as to which the Court might take judicial notice) such operating expense is about 60 per cent of gross revenue generally throughout the country. By the Hillman method percentages of operating ex-

pense to revenue after deducting estimated losses from the prescribed rates in the three cases are found to be as follows:

Intrastate passenger, N. P. 58.89; G. N. 67; M. & St. L. 62.54.

Interstate passenger, N. P. 51.69; G. N. 59.2; M. & St. L. 63.67.

Intrastate freight, N. P. 55.21; G. N. 41.51; M. & St. L. 48.19.

Interstate freight, N. P. 54.47; G. N. 60.58; M. & St. L. 85.03.

In the St. Louis case, in the intrastate business, without deducting for estimated loss, the operating expense would have been only 41.9 per cent of intrastate revenue, and in the Great Northern case such operating expense would have been only 39.9 per cent of intrastate revenue. There seems to be no substantial reason for the difference here found to exist on the Northern Pacific when compared with the Great Northern line, and the marked and necessarily conceded difference in density *133
of traffic over these lines and that over the Minneapolis & St. Louis line, the former greatly exceeding the latter, would be expected to produce very different results than those shown by this table of comparisons. The wide disparities and unusual results from comparisons are not adequately explained, and they strongly suggest an improper method of division between the two classes of business.

The Master finds from the weight of testimony that the cost per ton-mile of doing state freight business is at least two and one-half times as much as is such cost in doing the interstate freight business in Minnesota, and that the testimony would amply sustain, if it does not compel, a finding that such relation of cost is as three to one. He also finds from the evidence that the cost per passenger-mile in the state passenger business is at least fifteen per cent greater than such cost in the interstate passenger business in Minnesota.

As a result of the foregoing findings of fact we are now in possession of all the elements for a finding of net revenue derived from the doing of intrastate freight business and intra-

state passenger business, respectively, and they may be stated as follows for each of the three cases:

*134 NORTHERN PACIFIC CASE.

Net revenue derived from freight business and passenger business respectively.

Gross Earnings.

The total gross earnings of the Company from all sources, involving any use of the property above valued, within the state of Minnesota for the fiscal year ending June 30, 1908, was $13,682,983.27. (Complainants' Exhibit 80 B—Elliott, treating rentals as a "net" item of $259,196.65).

The above total amount is made up as follows:

Freight revenue (transportation)	$9,509,077.33
Miscellaneous freight earnings derived from switching, demurrage, storage, etc	314,431.02
Total freight earnings, including misellaneous	$9,823,508.35
Total passenger revenue (transportation of persons)	$2,955,868.51
Miscellaneous pasenger earnings (consisting of mail, express, etc)	556,670.01
Total passenger earnings	$3,512,538.52
Total freight and passenger earnings	$13,336,046.87

Division freight earnings between intrastate and interstate.

Total freight revenue, transportation:

Intrastate .....$1,555,342.92 equals 16.356 per cent
Interstate ..... 7,953,734.41 equals 83.644 per cent

Miscellaneous freight earnings divided on basis of transportation revenue.

Intrastate	$51,428.34	equals 16.356 per cent
Interstate	263,002.68	equals 83.644 per cent

Total freight earnings: *135

Intrastate	$1,606,771.26	equals 16.356 per cent
Interstate	8,216,737.09	equals 83.644 per cent
Total	$9,823,508.35	equals 100 per cent

Division passenger earnings between intrastate and interstate.

Passenger revenue:

Intrastate	$1,015,150.34	equals 34.344 per cent
Interstate	1,940,718.17	equals 65.656 per cent

Miscellaneous passenger earnings divided on basis of transportation revenue:

Intrastate	$191,162.75	equals 34.344 per cent
Interstate	365,487.26	equals 65.656 per cent

Total passenger earnings:

Intrastate	$1,206,333.09	equals 34.344 per cent
Interstate	2,306,205.43	equals 65.656 per cent
Total	$3,512.538.52	equals 100 per cent

In adition to the foregoing earnings there was derived from the use of property included in the foregoing valuation certain "miscellaneous income net items" from outside operations (sleeping, parlor and dining cars, etc.), rental received for use of tracks, yards and other property and hire of equipment, amounting in the aggregate to $346,936.40 plus $13,336,047.87 equals $13,682,983.27. (Ex. 80-B—Elliott.)

*136 OPERATING EXPENSES.

Total operating expenses in Minnesota for said year $7,655,350.20
(Exhibit 80-B—Elliott).
Total taxes 596,118.51

Total $8,251,468.71
(Exhibit 80-B—Elliott).

Total net income derived from the use of Minnesota property, included in valuation,—gross earnings from all such sources, $13,682,983.27— less operating expenses and taxes $8,251,468.71, leaves $5,431,514.56 equals 6.021 per cent return of value.

Division of operating expenses between freight and passenger.

Of the total operating expenses there was expended in the conduct of the freight business $5,343,718.25
And in the conduct of the passenger business.... 2,311,631.95

Total $7,655,350.20
(Exhibit 79—Elliott).

Division of freight operating expenses between intrastate and interstate freight.

The total freight operating expenses—$5,343,718.25 may be fairly and justly divided between the intrastate freight business and the interstate freight business, on either one of two bases:

1. The relation of the average intrastate ton mile cost to the average interstate ton mile cost—"Equated Ton Mile Basis"; and

2. The relation of cost required to produce a given amount of revenue in the intrastate business compared with the cost
*137 required to produce the same amount of revenue in the interstate business—"Equated Revenue Basis."

As hereinbefore found, during the said year, ending June 30, 1908, it cost said Company at least 2½ times as much on the average to produce a ton mile in the intrastate business as in the interstate busines.

During said year the relation of revenue per ton per mile derived from the intrastate business was as 1.4387 is to 1.0000, and on the same rates and under like conditions such relation will hereafter continue to be substantially the same.

To divide the total freight operating expenses on the Equated Ton Mile Basis—the relation of cost per ton per mile of intrastate business to the cost per ton per mile of the interstate business being as 2½ is to 1—multiply the actual number of intrastate ton miles by 2½ and the product will be the number of intrastate ton miles which would have been produced by the expenditure which was actually made in the conduct of the intrastate freight business, if the production of a ton mile in the intrastate business on the average had been attended by the same cost as the production of a ton mile in the interstate business on the average,—then add such product to the actual number of interstate ton miles, and the sum will be the total number of ton miles, both intrastate and interstate which would have been produced by the expenditure which was actually made in the conduct of both classes of business if the production of a ton mile in the intrastate business on the average had been attended by the same cost as the production of a ton mile in the *138
interstate business on the average,—this total may be called the "Equated Ton Miles". For the intrastate operating expenses take such precentage of the total freight operating expenses as the number of ton miles so increased—or equated—is of the total number of equated ton miles, and for the interstate operating expenses take such per cent of the total operating expenses as the interstate ton miles is of the total equated ton miles.

To divide such total freight operating expenses on the

Equated Revenue Basis, the relation of cost per ton per mile of the intrastate business to the cost per ton per mile of the interstate business, being as 2½ is to 1, and the relation of revenue per ton mile per mile derived from the intrastate business to the revenue per ton per mile derived from the interstate business, being as 1.4387 is to 1.0000, first determine what—on such facts—is the relation of cost per ton per mile in the intrastate business in proportion to revenue, to the cost per ton per mile in the interstate business in proportion to revenue. This may be done by dividing such ton mile relation by such revenue relation, as follows:

$$\begin{array}{cccc} 250 & \div & 1.4387 & = & 1.7377 \\ \hline 100 & & 1.0000 & & 1.0000 \end{array}$$

It, therefore, appears that the production of a given amount of revenue in the intrastate freight business is attended with greater cost than the production of the same amount of revenue in the interstate freight business, and that such excess of cost is and will be at least 73.77 per cent.

To divide total freight operating expenses on the "Equated Revenue Basis" in accordance with the facts in this case as above stated:

*139 Increase the intrastate earnings by 73.77%, thereby showing what would have been earned by the same actual expenditure in the conduct of the intrastate business had it been attended with the same relative cost as the interstate business. Then add the intrastate earnings, as so increased—or equated—to the interstate earnings, thereby ascertaining what would have been earned by the actual expenditure in conducting both intrastate and interstate traffic had the former been attended with the same relative cost as the latter. Then ascertain what proportion of this total represents the intrastate earnings as so increased—or equated—and what proportion represents the interstate earnings, and then ascertain the corresponding proportions of the total cost of the intrastate and interstate freight

traffic, and the same will be the cost of intrastate freight business and interstate freight business respectively. (See 163 Fed. 141.)

The equated ton mile basis on the relation of 2½ to 1 is in this case exactly the same as the equated revenue basis on the relation of 1.7377 to 1.0000.

Applying either of these rules to the facts above stated, the total freight operating expenses—$5,343,718.25—is divided as follows:

Intrastate	$1,355,273.82=25.362%
Interstate	3,988,444.43=74.638%
	$5,343,718.25=100%

Division of total passenger operating expenses between intrastate passenger and interstate passenger.

As hereinbefore stated, it is found that during said year it cost said Company to produce an intrastate passenger mile in said State 1.15 times as much as to produce an interstate passenger mile in said State. *140

The evidence shows that the average revenue per passenger mile in the intrastate business was $1.9404 (computed from 80 Elliott), and in the interstate business was 1.9228 (computed from 80 Elliott). The relation of such revenue, intrastate to interstate, is as 1.0092 to 1.0000. The relation of cost in proportion to revenue is:

$$\frac{115}{100} \div \frac{1.0092}{1.0000} = \frac{1.1395}{1.0000} \text{ or } 1.1395 \text{ to } 1.0000.$$

Such total passenger operating expenses may fairly and justly be divided between the intrastate business and the interstate business on the "Equated Passenger Mile Basis," or the "Equated Revenue Basis," in like manner as that hereinbefore stated for the division of the freight operating expenses between

the intrastate freight business and interstate freight business on the two similar bases heretofore explained.

The "Equated Passenger Mile Basis," on relation of cost per passenger mile intrastate to interstate, 1.15 to 1, is exactly the same as the "Equated Revenue Basis" on the relation of 1.1395 to 1.0000.

Dividing the total passenger operating expenses, $2,311,631.95—100%—on either of such bases, there will be assigned to the intrastate passenger business $863,325.18=37.347%, and to the interstate passenger business $1,448,306.77=62.653%.

*141 *Apportionment of taxes to various classes of business.*

The total taxes and assessments paid in Minnesota by said Company in said year amounted to $596,118.51. Such sum may be fairly and justly apportioned to the various classes of business on the gross earnings basis as follows:

Intrastate freight	$71,820.32
Interstate freight	367,286.53
Intrastate passenger	53,924.08
Interstate passenger	103,087.58
	$596,118.51

Apportionment of other income to various classes of business on the gross earnings basis.

During said year the Company received for "Rentals" and for "Hire of Equipment" over and above amounts paid on account thereof in Minnesota, $259,196.65, which amount may justly and fairly be distributed between the various classes of business, on the gross earnings basis.

In addition to the last mentioned sum, there was received from "Outside Operations" (consisting of sleeping, dining, chair and parlor cars, etc.), $87,739.75, which may fairly and

justly be divided between the intrastate passenger business and the interstate passenger business on the passenger earnings basis.

On account of the two items last mentioned there should be added to the earnings derived from each class of business the following sums:

Intrastate freight	$31,227.99	
Interstate freight	159,698.85	
Total	$190,926.84	
Intrastate passenger	$53,579.92	*142
Interstate passenger	102,429.64	
Total	$156,009.56	

(See Exhibit 80—B Elliott).

Net income applicable to return upon valuation of property apportioned to the various classes of business.

If from such total receipts so assigned to each class of intrastate business as hereinbefore stated, there be deducted the sum of the operating expenses and taxes so assigned to each such class of intrastate business, we have the following results:

Intrastate net freight income $210,905.11 yields sufficient for an annual return on $10,867,837 of only 1.941%.

Note.—The losses which would have resulted from the application of the commodity rates enjoined have not been deducted. From Exhibit 63—Johnson, it is estimated that the intrastate freight earnings in Minnesota would have been reduced in said year by the application of such rates $21,493.67, which would effect a reduction in the rate of return last mentioned.

Intrastate passenger income $342,663.75 sufficient to yield an annual return upon $8,159,782 of only 4.2%.

Total intrastate (freight and passenger) income, $353,568.-86, sufficient to yield an annual return on $19,027,619 (total valuation assigned to all intrastate business) of only 2.909%.

The foregoing data, deductions and results are included or deducible from the table following:

CHARTS

TOO

LARGE

FOR

FILMING

Note 1.—In this statement the valuation of the property is *144
divided upon the revenue basis between freight and passenger and inter and intra of each.

If it be considered that operating expenses more correctly measure the use of the property than earnings, the division would be as follows:

Intra Freight.

Dividing valuation on operating expense basis.

Intra freight operating expenses.....$1,355,273.82=17.7%
All operating expenses..... 7,655,350.20= 100%
17.7% of $90,204,545 valuation=16,166,204
Intra income—freight 210,905.11
Annual return..... 1.304%

Intra Passenger.

Intra Passenger operating expenses.....$863,325.18=11.28%
All operating expenses.....7,655,350.20= 100%
11.26% of $90,204,545 valuation= 10,175,073
Intra income—passenger 342,663.75
Annual return 3.368%

The rate of return on interstate freight and passenger would be increased over that shown in the statement.

There were introduced in evidence various statements by defendants for the purpose of showing what they claimed the actual net Minnesota intrastate freight and Minnesota intrastate passenger incomes were in the business of the fiscal year ending June 30, 1907, but the same, when taken in connection *145
with all the testimony, fail to show that the rates complained of were not confiscatory. The defendants offered no corresponding statements with respect to such business for the year ended June 30, 1908.

Net revenue derived from freight business and passenger business respectively.

Gross Earnings.

The total gross earnings of the Company from all sources, involving any use of the property above valued within the state of Minnesota, for the fiscal year ending June 30, 1908, was $20,831,317.57. (See Exhibit 30—Parker, 49—Martin, 53—Ward and reports to the State, fiscal year ending June 30, 1908.)

The above total amount is made up as follows:

Freight revenue transportation	$15,658,661.07
Miscellaneous freight earnings derived from switching, demurrage, storage, etc	278,337.78
Total freight earnings including miscellaneous.	$15,936,998.85
Total passenger revenue (transportation of persons)	3,640,627.45
Miscellaneous passenger earnings (consisting of mail, express, etc.)	698,281.45
Total passenger earnings	$4,338,908.90
Total freight and passenger earnings	20,275,907.75

*146 *Division of freight earnings between intrastate and interstate.*

Total freight revenue transportation:	
Intrastate	$2,366,369.02=15.112%
Interstate	13,292,302.05=84.888%
Miscellaneous freight earnings divided on basis of transportation revenue:	
Intrastate	$42,062.41=15.112%
Interstate	236,275.37=84.888%

Total freight earnings:	
Intrastate	$2,408,421.43=15.112%
Interstate	13,528,577.42=84.888%
Total	$15,936,998.85=100%

Division passenger earnings between intrastate and interstate.

Passenger revenue:	
Intrastate	$1,750,522.02=48.083%
Interstate	1,890,106.43=51.917%
Miscellaneous passenger earnings divided on basis of transportation revenue:	
Intrastate	$335,754.66=48.083%
Interstate	362,526.79=51.917%
Total passenger earnings:	
Intrastate	$2,086,276.68=48.083%
Interstate	2,252,632.22=51.917%

In addition to the foregoing earnings there was derived from the use of the property included in the foregoing valuation *147
certain miscellaneous income from outside operations (sleeping, parlor, dining cars, etc.), rentals received for use of tracks, yards and other property and hire of equipment amounting in the aggregate to $555,409.82+$20,275,907.75=$20,831,317.57. (See exhibits and reports above cited.)

OPERATING EXPENSES.

Total operating expenses in Minnesota for said year (See Exhibit 47—Martin)	$11,811,414.35
Total taxes	839,878.11
Total	$12,651,292.46

Total net income derived from the use of property in Minnesota—gross earnings from all sources	$20,831,317.57
Less operating expenses and taxes	12,651,292.46
Leaves	$8,180,025.11

=5.909% on $138,425,291 total Minnesota valuation.

Division of operating expenses between freight and passenger.

Of the total operating expenses there was expended in the conduct of the freight business	$8,141,355.61
And in the conduct of the passenger business.	3,670,058.74
Total	$11,811,414.35

(See Exhibit 47—Martin.)

Division of freight operating expenses between intrastate and interstate.

The total freight operating expenses—$8,141,355.61—may be justly and fairly divided between the intrastate freight business
*148 and the interstate freight business on either of two bases:

1. The relation of the average intrastate ton mile cost to the average interstate ton mile cost—"Equated Ton Mile Basis;" and

2. The relation of cost required to produce a given amount of revenue in the intrastate business compared with the cost required to produce the same amount of revenue in the interstate business—"Equated Revenue Basis."

As hereinbefore found, it did during said year, cost said Company at least 2½ times as much on an average to produce a ton mile in the intrastate business as in the interstate business.

During said year the relation of revenue per ton per mile

derived from intrastate business to the revenue per ton mile derived from the interstate business was as 2.02894 is to 1.00000 (53—Ward); and on the same rates and under like conditions such relation will hereafter continue to be substantially the same.

The relation of cost per ton per mile in the intrastate business in proportion to revenue to the cost per ton per mile in the interstate business in proportion to revenue is $\frac{250}{100} \div \frac{2.02894}{1.00000}$ or 1.23217 to 1.00000. That is to say, the production of a given amount of revenue in the intrastate freight business is attended with greater cost than the production of the same amount of revenue in the interstate freight business, and such excess of cost is and will be at least 23.217%.

The division of the total freight operating expenses on the Equated Ton Mile Basis or on the Equated Revenue Basis may be effected in the same manner as that heretofore described in the Northern Pacific case.

The Equated Ton Mile Basis on the relation of 2½ to 1 is *149
in this case exactly the same as the Equated Revenue Basis on the relation of 1.23217 to 1.

Applying either of the rules above referred to to the facts in this case as above stated, the total freight operating expenses, $8,141,365.61, is divided as follows:

Intrastate.....	$1,464,629.87=17.99%
Interstate.....	6,676,725.74=82.01%
	$8,141,355.61=100%

Division of total passenger operating expenses between intrastate passenger and interstate passenger.

As hereinbefore stated it is found that during said year it cost said Company to produce an intrastate passenger mile, in

said State, 1.15 times as much as to produce an interstate passenger mile in said State.

The evidence shows that the average revenue per passenger per mile in the intrastate business was 1.9016, and in the interstate business was 2.0469. (53—Ward.)

The relation of such revenue intrastate to interstate is as 0.92901 is to 1.00000.

The relation of cost in proportion to revenue is

$$\frac{115}{100} \div \frac{0.92901}{1.00000} = \frac{1.2378}{1.00000} \text{ or } 1.2378 \text{ to } 1.$$

Such total passenger operating expenses may fairly and justly be divided between the intrastate business and the interstate business on the Equated Passenger Mile Basis, or the Equated Revenue Basis, in like manner as that hereinbefore stated in the Northern Pacific case for the division of the
*150 freight operating expenses between the intrastate freight business and the interstate freight business, on the two similar bases there explained.

The Equated Passenger Mile Basis on the relation of cost per ton per mile intrastate to interstate, 1.15 to 1. is exactly the same in this case as the Equated Revenue Basis on the relation of 1.2378 to 1.

Dividing the total passenger operating expenses—$3,670,058.74—100%—on either of such bases, there will be assigned to intrastate passenger business $1,960,215.07=53.411%, and to the interstate passenger $1,709,843.67=46.589%.

Apportionment of taxes to various classes of business.

The total taxes and assessments paid in Minnesota by said Company in said year amounted to $839,878.11. Such sum may be fairly and justly apportioned to the various classes of business on the gross earnings basis as follows:

Intrastate freight	$99,761.00
Interstate freight	560,383.19
Intrastate passenger	86,421.46
Interstate passenger	93,312.46
Total	$839,878.11

Apportionment of other income to various classes of business on gross earnings basis.

During said year the Company received for rentals and for hire of equipment over and above amounts paid on account thereof in Minnesota $482,763.95, which amount may justly and fairly be distributed between the various classes of business on the gross earnings basis.

In addition to the said last mentioned sum there was received from outside operations (consisting of sleeping, dining, chair and parlor cars, etc.) $92,645.87, which may fairly and justly be divided between the intrastate passenger business and the interstate passenger business on the passenger earnings basis. *151

On account of the two items last mentioned there was added to the earnings derived from each class of business the following sums:

Intrastate freight	$54,967.25
Interstate freight	308,765.21
	$363,732.46
Intrastate passenger	$92,164.23
Interstate passenger	99,513.14
	$191,677.36

(See reports to the State for the year ending June 30, 1908.)

Net income applicable to return upon valuation of property apportioned to the various classes of business.

If from such total receipts so assigned to each class of intrastate business as hereinbefore stated there be deducted the sum of the operating expenses and taxes so assigned to each such class of intrastate business, we have the following results:

Intrastate freight, income, $898,997.81, sufficient to yield an annual return on $16,442,200 of only 5.468%.

Note.—The losses which would have resulted from the application of the commodity rates enjoined have not been deducted. The same are shown by Exhibit 22—Parker to be $87,-261.43 (and by Exhibit G—Hillman, Table 11, $129,852.53).

*152 Deducting the amount shown by Complainants—$87,261.43—less 4% taxes—$3,490.46—leaves a net deduction $83,770.97, which subtracted from net intrastate freight income as above stated, $898,997.81, would leave $815,226.84, sufficient to yield an annual return on the value above stated (valuation not re-apportioned on account of change in revenue) of 4.958%. And if the amount of such losses as estimated by the defendants be taken, the rate of return would be less than the figure last stated.

Intrastate passenger income $131,804.37 is sufficient to yield an annual return upon $12,243,633 of only 0.925%.

Total intrastate (freight and passenger) income (estimated commodity losses not deducted), $1,030,802.18 is sufficient to yield an annual return on $30,685,833 (total valuation assigned to all intrastate business) of only 3.359%.

Deducting the commodity losses, less the taxes, as estimated by complainants as aforesaid, the total intrastate (freight and passenger) income would be sufficient to yield an annual return on total value assigned to all intrastate business of only 3.086%.

The foregoing data, deductions and results are included in or deducible from the table following:

CHARTS

TOO

LARGE

FOR

FILMING

Note 1.—In this statement valuation of the property is di- *154
vided upon the revenue basis between Freight and Passenger, and inter and intra of each.

If it be considered that operating expenses more correctly measure the use of the property than earnings, the division would be as follows:

Intra Freight.

Intra Freight operating expenses.....	1,464,629.87=12.4%
All operating expenses.....	11,811,414.35= 100%
12.4% of $138,425,291 valuation =	17,164,736
Income—Intra Freight	898,997.81
Annual return	5.237%

Intra Passenger.

Intra Passenger operating expenses...	$1,960,215.07=16.6%
All operating expenses.....	11,811,414.35= 100%
16.6% of $138,425,291 valuation =	22,978,596
Income—Intra Passenger	131,804.07
Annual return	0.574%

The rate of return on intrastate freight and interstate passenger would be increased over that shown in the statement.

Note 2.—The intrastate freight loss which would have resulted by the application of Chapter 232 was estimated by Hillman's Exhibit G, Table 10, at $129,852.53. By Parker's Exhibit 22 it was estimated at $87,261.42. In statement No. 3 no deduction has been made from intrastate freight revenue on account of such loss.

The amount of intrastate *net* freight revenue shown by the statement is	$898,997.81	
Subtracting loss shown by Exhibit 22—Parker..	87,261.43	*155
The new net intrastate revenue would be.....	$811,736.38	

Divided by the proportion of value assigned to intrastate

freight, to-wit, $16,442,200, the net annual return of 4.937% on intrastate freight will be the result instead of 5.468% as shown on the statement. (The computation producing the rate of return first above mentioned—4.937—does not take into account the reapportionment of value to intrastate freight resulting from the reduction of intra gross freight earnings. If such reapportionment were made the value of property so assigned would be somewhat decreased, and the rate of return somewhat increased over 4.937).

Note 3.—Hillman does not show the intrastate freight loss which did result from the application of the merchandise rates complained of. Parker by his Exhibit 22 did show the same to be $178,978.96. What would be the net annual return on value of property apportioned to intrastate freight if injunction continues against commodity rates, and old merchandies rates prior to orders of September 6, 1906, and May 3, 1907, be fully restored?

The statement shows net intrastate freight pays.	$898,997.81
Add merchandise loss.....	178,978.96

And the new net intrastate freight income would be $1,077,976.77 which divided by value assigned to intrastate freight—$16,442,200—(not reapportioned to correspond with increased intrastate earnings), less than 6.556% would be produced. *But* if valuation be reapportined to correspond with increased intrastate gross earnings, $17,591,257, valuation would be assigned to intrastate freight business, which divided into the new net intrastate freight earnings—$1,077,976.77—then 6.128% return
*156 on intrastate freight business would be shown on basis of old rates, merchandise and commodity.

Note 4.—The statement shows passenger intrastate net income applicable to valuation to be $131,804.37, and the rate of return to be less than 1%, to-wit, 0.925%. Tilton, by his Exhibit 37, shows a passenger intrastate loss of $470,673.17. If this be added to $131,804.37, a new net intra passenger in-

come applicable to valuation of $602,477.54 would result. The value apportioned to intra passenger business in the statement on the basis of the gross earnings as they were was $14,243,633. If the passenger rates were restored to the 3 cent basis, and gross earnings thereby increased, an apportionment of value on basis of increased earnings would assign to intra passenger $17,350,075, which divided into the new net income—$602,477.-54—would produce only 3.473% return on intra passenger business if the old rates were restored.

There were introduced in evidence various statements by defendants for the purpose of showing what they claim the actual net Minnesota intrastate freight and Minnesota intrastate passenger income were on the business of the fiscal year ending June 30, 1908, (see Exhibit G—Hillman).

The gross receipts of said Company from all sources in Minnesota used in the foregoing table exceeds the gross receipts charged against the Company in Minnesota by defendants' evidence (excluding income on investments), $146,528.27, of which more than $140,000 was on account of hire of equipment not taken into account by defendants in their tables. There is no dispute between the parties as to the total amount of operating expenses chargeable to the business of the Company done within the State.

There is considerable difference between the parties in the *157
distribution of revenue to the various classes of business, intrastate and interstate freight, intrastate passenger and interstate passenger, and also a considerable difference as to the assignment of operating expenses to each such class of business, which difference, as respects the operating expenses, is due to the methods of division of the total amount thereof employed by the witness Hillman. As hereinbefore stated, the results obtained by the employment of his methods of division of operating expenses are found not to be correct, fair or just.

If the distribution of the total revenue to such various classes of business be made as the defendants' exhibits indicate, and

the division of the operating expenses between the freight department and the passenger department be made as hereinbefore found to be fair and just, and the division of freight cost between the intrastate business and the interstate business be made as hereinbefore found to be fair and just, and the division of passenger cost between the intrastate business and the interstate business be made as hereinbefore found to be just and fair, the result would not affect the final decree recommended to be entered.

*158 APPORTIONMENT OF VALUE BETWEEN FREIGHT AND PASSENGER BUSINESS AND BETWEEN INTRASTATE AND INTERSTATE BUSINESS OF EACH.

Minneapolis & St. Louis Case.

Total value of the property of the Minneapolis & St. Louis Company used in the fiscal year ending June 30, 1907, in the conduct of its business in Minnesota, was, as hereinbefore found, $21,608,464.

Such total value may be fairly and justly apportioned between the freight business and the passenger business on the gross earnings basis—that is, assign to each such percentage of total value as the amount of the gross earnings of each bears to the total gross earnings of both. The value so apportioned to the freight and passenger business may in similar manner be justly and fairly divided on the gross earnings basis between the intrastate business and the interstate business of each.

A statement of freight and passenger revenues in Minnesota, for the year ending June 30, 1907, divided between Minnesota intrastate business and Minnesota interstate business, is as follows:

	Minnesota Intrastate.	Minnesota Interstate.	Total.
Freight revenue.....	$534,696.66	$1,180,155.91	$1,714,852.57
Passenger revenue..	352,008.52	298,258.28	650,266.80
	$856,705.18	$1,478,414.19	$2,365,119.37
Per cent.....	37.49%	62.51%	100%

(Ex. 33—Scott, Section D.)

The following is a summary of the apportionment of total *159
value to the different classes of business in Minnesota:

SUMMARY OF APPORTIONMENT OF TOTAL VALUE TO THE DIFFERENT CLASSES OF BUSINESS IN MINNESOTA.

Total value of property used in transportation business in Minnesota, for the fiscal year ending June 30, 1907.....		$21,608,464.00
Total value apportioned to freight business, 72.51%, or.....	$15,668,297.24	
Total value apportioned to passenger business, 27.49%, or...	5,940,166.76	
Total.....		$21,608,464.00
Assign to intrastate freight business 22.61% of total value apportioned to freight business..		$4,885,673.71
Assign to interstate freight business 49.90% of total value apportioned to freight business..		10,782,623.53
Assign to intrastate passenger business in Minnesota 14.88% of the total value assigned to passenger business		3,215,339.44

Assign to interstate passenger business in Minnesota 12.61% of total value assigned to passenger business in Minnesota.....	2,724,827.32
	$21,608,464.00

If such valuation were to be apportioned on the same basis but according to the figures shown by defendants' evidence (see Ex. L—Hillman, Table 14), the final decision would not be changed.

To yield an annual return of 7% upon the value so assigned, there would be required for intrastate freight.. $341,997.15

For interstate freight.....	754,783.64
For intrastate passenger.....	225,073.76
For interstate passenger.....	190,737.91
Total	$1,512,592.48

*160 The defendants introduced testimony and exhibits which show what they claim to have been the net income (after paying only operating expenses and taxes), derived from the intrastate freight business, and from the intrastate passenger business as follows:

Total income, all sources, applicable to intrastate freight	$225,890.00
(Defendants' Ex. L—Hillman, Table 12.)	
Total income, all sources, applicable to intrastate passenger	148,721.70
(Defendants' Ex. L—Hillman, Table 13.)	

Each of the amounts so claimed by defendants is in excess of the actual net income from all sources, derived from such classes of business respectively, over and above operating expenses and taxes. The method employed by the defendants for the ascertainment of the amount of operating expenses chargeable to each such class of business was not correct, fair or just, and resulted in assigning to each such class of bus-

iness an amount much less than was in fact expended by said Company in said year in the conduct thereof.

* * * * * * * * *

The total net earnings of said Company for said year 1907 in Minnesota, from all sources, which involved the use of the property included in such valuation was $895,977.66, sufficient to yield an annual income upon such value of $21,608,464 of only 4.14%. (See Ex. 33—Scott.)

The cost of conducting each class of the intrastate business covered by the rates complained of is greater in proportion to the revenue derived from each such class of business than was the cost of conducting the corresponding class of interstate *161
business of said Company in said year in said state, and the amount of net income derived from each such class of intrastate business is less than sufficient to yield an annual return of 4.14% upon the proportion of the value of the whole property which was used in the conduct of each such class of business, and which is properly chargeable thereto.

NET EARNINGS.

(Entire railway system of said Company.)

The net earnings, after paying only operating expenses and taxes, from 1903 to 1909, both inclusive, was as follows:

Net Earnings.

1903.	1904.	1905.	1906.
$1,398,895.30	$1,229,524.49	$1,277,870.96	$1,511,961.99

1907.	1908.	1909.
$1,419,822.54	$1,220,862.21	$1,286,494.08

(Ex. 33—Scott.)

NET EARNINGS.

(Minnesota.)

The net earnings of said Company, after paying only operating expenses and taxes, on all of its business in Minnesota, from all sources, involving any use of the property valued herein, from 1903 to 1909, both inclusive, was as follows:

Net Earnings.

1903.	1904.	1905.	1906.
$1,222,941.77	$1,052,478.74	$1,054,853.35	$1,109,260.56
1907.	1908.		1909.
$695,977.66	$742,377.46		$794,472.58

*162 INTEREST CHARGES.

As of date April 30, 1908, the annual interest charges which said Company was and is subject to pay on account of bonds was $952,583.

If this be apportioned among states on the basis of gross earnings, the amount chargeable to each state is as follows:

Minnesota	$690,517
Iowa	244,120
South Dakota	17,946
	$952,583

(Exhibit 6—Scott.)

The par value of such bonds on said date was $20,011,800. (Exhibit 6—Scott.)

EFFECT OF RATES COMPLAINED OF UPON REVENUE.

MERCHANDISE RATES.

If the merchandise rates complained of had been in effect during the year ending June 30, 1907, the Minnesota intra-

state revenue of the Minneapolis & St. Louis Company derived from the business covered by such rates would have been reduced $33,367.30, more than 19½% of the revenue derived from such business. (Ex. 16—Scott and Ex. 21—Tittemore.)

PASSENGER BUSINESS.

On the volume of the passenger service rendered by the Minneapolis & St. Louis Company within the state of Minnesota for the year ending June 30, 1906—the last complete fiscal year during which the basis of maximum fare of three cents per mile was applied by said Company—the losses in revenue which would have resulted had the two-cent per mile passenger law complained of been in effect, are as follows: *163

Intrastate passenger business in Minnesota.....	$72,453
Interstate passenger business in Minnesota.....	74,371
	$146,824

(See Ex. 13—Scott.)

The volume of passenger service rendered during the fiscal year 1907 was greater than the preceding fiscal year. (Ex. 12—Scott, Ex. 33—Scott.)

COMMODITIES CHAPTER 232.

As hereinbefore stated, the Northern Pacific Company, the Great Northern Company and the Soo Company reduced rates in the autumn of 1906, in Minnesota, on coal and grain. By reason of these reductions the Minneapolis & St. Louis Company was compelled to make certain reductions on coal and grain on its line with respect to such business, intrastate, in Minnesota, and certain of its corresponding interstate business. Immediately prior to the commencement of these suits the Minneapolis & St. Louis Company, intending to obey the law

and apply the rates prescribed in Chapter 232, prepared certain tariffs covering the commodities described in said Chapter 232, which tariffs with respect to intrastate business were as high as said Company could maintain under the act, and which interstate tariffs were as high as said Company could maintain and comply with the provisions of said act with respect to such intrastate business.

On the volume of business in the transportation of commodities covered by said act, of said Company, moved during the fiscal year ending June 30, 1906, the revenues of said Company
*164 —if the aforesaid tariffs required and made necessary by the provisions of said act, had been in force, would have been decreased below what the same would have been had the rates remained the same as they were in fact after the reductions in the autumn of 1906, made necessary by reason of the reductions in the northern lines hereinbefore referred to, as follows:

Minnesota intrastate,
$51,802.22, more than 14% of revenue affected.

Minnesota interstate,
$66,842.46, more than 16% of revenue affected.

Other interstate,
$26,847.55, more than 11% of business affected.

Making a total of,
$145,492.23, more than 14% of business affected.

Comparing the revenue on the commodities described in said act, which would have been received on the business of the fiscal year ending June 30, 1906, under the rates prescribed in said act, with revenue which would have been received on the same business if the rates had remained the same throughout the year as they were prior to the reductions made as aforesaid in the autumn of that year, the resulting loss would have been as follows:

Minnesota intrastate,
$70,760.83, more than 19% of revenue affected.
Minnesota interstate,
$82,101.42, more than 19% of revenue affected.
Other interstate,
$26,847:55, more than 11% of revenue affected.

Total.....$179,709.80, more than 17% of revenue affected.
(See Ex. 14-A—Tittemore.)

REVENUE DERIVED FROM OPERATION, FISCAL YEAR ENDING JUNE 30, 1907. *165

(Exhibit 33—Scott, Sec. D, Exhibit M—Hillman.)

	Intrastate.	Interstate.	Total.
Freight revenue (transportation)	$534,696.66 31.18%	$1,180,155.91 68.82%	$1,714,852.57
Miscellaneous (consisting of switching, demurrage, storage, etc.)	1,151.55	2,541.67	3,695.22
	$535,848.21	$1,182,697.58	
Passenger revenue	$352,008.52 54.13%	$298,258.28 45.87%	$650,266.80
Miscellaneous (consisting of mail, express, excess baggage, etc).....	60,474.43	51,246.29	111,720.72
	$412,482.95	$349,504.57	$2,480,533.31

(Division of Miscellaneous between intra and inter is on gross revenue basis.)

Operating expenses in the state..... $1,554,695.49
(Exhibit 33—Scott.)

Divided between freight and passenger as follows:
Passenger $523,375.97
Freight 1,031,219.52 $1,554,595.49
(Exhibit 33—Scott, Sec. B and p 1175 P. R. et seq.)

Dividing freight operating expenses—$1,031,219.52—on "straight revenue basis":

Assigns 31.18%=$312,298.33 to intrastate freight,
Assigns 68.82%=$718,966.19 to interstate freight.

*166 Dividing passenger operating expenses, $523,375.97 in like manner,
Assigns 54.13%=$283,303.41 to intrastate passenger,
Assigns 45.87%=$240,072.56 to interstate passenger.

Taxes paid in Minnesota, fiscal year ending June 30, 1907, $124,474.58, (Ex. 33—Scott, Sec. B), apportioned to the various classes of business on revenue basis.
Assigns 22.61% thereof = $28,143.70 to intrastate freight,
Assigns 49.90% thereof = $62,112.81 to interstate freight,
Assigns 14.88% thereof = $18,521.77 to intrastate passenger,
Assigns 12.61% thereof = $15,696.24 to interstate passenger.

Adding operating expenses assigned to each such class of business to taxes assigned to each such class of business, and subtracting the sum from the foregoing gross earnings from operation of each such class of revenue, and we have the following results:

Intrastate freight, net operating revenue less operating expenses and taxes..... $195,451.18
Interstate freight, net operating revenue less operating expenses and taxes..... 401,618.58

Intrastate passenger, net operating revenue less operating expenses and taxes.....	110,657.77
Interstate passenger, net operating revenue less operating expenses and taxes.....	93,735.77
Total net operating revenue.....	$801,463.30

less taxes (stated in Ex. 33—Scott earnings over expenses and taxes.)

In addition to the earnings aforesaid the Company received in Minnesota in said year from use of its property certain "other income," being net items aggregating $94,514.42, (Ex. 33—Scott, Sec. B), which, distributed on the revenue basis,
Assigns 22.61% or $21,369.71 to intrastate freight, *167
Assigns 49.90% or $47,162.69 to interstate freight,
Assigns 14.88% or $14,063.74 to intrastate passenger,
Assigns 12.61% or $11,918.26 to interstate passenger.

Adding $21,369.71 (other income assigned to intrastate freight) to $195,451.18 (earnings over expenses and taxes) we have $216,820.89.

The commodity rates complained of were enjoined. Had the same been in effect intrastate freight revenue would have been decreased on that account at least $51,802.22. (See Ex. 14-A—Tittemore.)

The class rates complained of were applied November 15, 1906. Had the same been in effect during the whole fiscal year the revenue of the Company would have been decreased on that account $\frac{11}{24}\times\$33,367.30=\$15,293.34$ (See Ex. 15—Scott), making the total reduction of intrastate revenue on account of rates complained of $51,802.22—$15,292.34=$67,094.56, which, subtracted from $216,820.89 leaves *$149,726.33*, sufficient to pay an annual return of *3.06%* upon $4,885,673.

The net earnings of the intrastate passenger business over

expenses and taxes, $93,735.77—$14,063.74, the intrastate passenger proportion of other income=$107,799.51, the total net intrastate passenger income from all sources involving any use of the property valued.

The passenger rates complained of were first applied May 1, 1907. If the same had been in effect during the whole of such fiscal year, the intrastate passenger revenue would have been
*168 decreased 5-6×$72,453, or $62,044.16, subtracted from $107,-799.51, leaves $45,655.35, sufficient to yield only 1.42% on $3,215,339.

Total net intrastate income—freight and passenger—all sources involving any use of property:

Intrastate freight	$149,726.33
Intrastate passenger	45,765.35
	$195,481.68

divided by $4,885,673, intrastate freight value, plus $3,215,339, intrastate passenger value (8,101,012)=2.41% return derived from total intrastate business on total valuation assigned thereto.

Dividing the freight operating expenses and the passenger operating expenses of Minnesota between intrastate business and the interstate business respectively, on the *"straight revenue basis,"* as aforesaid, does not assign to either class of such intrastate business the full amount of operating expenses which was actually expended in the conduct thereof, and consequently the rates of return on value—*3.06%* for the intrastate freight, and *1.42%* for the intrastate passenger, and 2.41% for total intrastate—freight and passenger—are in excess of the actual returns respectively which would have been earned if the rates complained of had been in effect during the whole of such fiscal year.

It appears from the foregoing facts, and the Master finds that for the two years next prior to July 1, 1908, in these three

cases the revenue derived by the said defendant railway companies and each of them from the property thereof devoted to the public use in the operation of their respective lines of railway and the conduct of their business as common carriers of passenger and freight within and local to the State of Minnesota, were and that they still are inadequate and insufficient compensation for the property so used and the service rendered, and that the aforesaid rates prescribed by the Orders of the Railroad & Warehouse Commission and the Acts of the legislature were and still are unreasonably low, unjust and confiscatory, and, in the immediate future and until there shall be very material changes in existing conditions not likely soon to occur, they will continue so to be, and that the enforcement of said orders and acts should be enjoined and restrained, as well because they are unreasonably low and confiscatory as because they constitute a burden upon and an interference with and a regulation of interstate commerce, as has been hereinbefore found and determined. *169

XVIII.

EXPRESS BUSINESS.

The relation of the express companies, doing business over the Northern Pacific Company's and Great Northern Company's respective lines of railway, to the said respective companies ought not to be passed over without mention. It appears that each railroad company owns all the stock of the express company operating on its line and that the express business is conducted under a contract between the express company and the railway company whereby the latter receives certain fixed compensation for the privileges granted to the express company, which compensation, of course, is included in the operating revenue of the railway company. But the

*170 express company pays very substantial dividends on its capital stock which is received by the railway company but not included by it in such operating revenue, and there is considerable force in defendants' contention that such dividends should be considered as operating revenue. It must be remembered, however, that the business of an express company is in many respects of a very different character to that of a railway company, and its scope is much broader than that of an ordinary common carrier. The business of such express company is to assemble, insure, especially care for and speedily forward to and distribute at point of destination all articles of transportation committed to its charge, including the issuing of express money orders, making collections and other like kinds of service required in commercial affairs. Manifestly such services in general are widely different from those usually performed by a railway company, and suggests the propriety if not the necessity of a separate and independent agent for their performance. Since, however, by ownership of stock the railway company receives the net revenue of the express company, and does not include it as a revenue derived from the operation of its own business, as indeed it is not, it is important that the public who are directly interested in the operating revenue of the railway company, derived as it is from rates paid by them, should be protected against any unfair contract between the railway company and the express company controlled by it whereby the latter may not be accorded full value for services rendered, and the burden of establishing the fairness of such
*171 contract whenever called in question is upon the railway company. In the instant cases, however, the evidence does not justify a finding that the railway companies in question do not receive full and fair compensation for services rendered to the express companies, and they are, therefore, not required to include express dividends in their operating revenue.

XIX.

CONCLUSION.

The foregoing findings of fact and conclusions of law the Master deems sufficient to cover all the issues necessary for final judgment in these three cases. It is needless to say that they have been thoroughly and carefully tried and with marked ability on behalf of both parties, and nothing has been left undone to fully apprise the Court of every fact necessary to reach a just decision, and to this end counsel on both sides have given their undivided attention in the presentation of testimony and preparation of briefs, and in oral argument, for a period of nearly two and a half years, time as the Master believes well spent in the ultimate determination of questions of great national as well as of great commercial importance.

In addition to the testimony reported to the Court, it has been agreed between the parties that reference might be made to the reports of the several companies annually made to the Railroad & Warehouse Commission without a transcription thereof and its inclusion with the other testimony herewith reported to the Court, and both parties have made recourse *172 thereto in preparing exhibits in evidence and in submission of the causes for decision.

In obedience to the order of Court the Master submits forms of decree which he recommends to be entered in the three cases, and the same are hereto annexed and made part of this report.

All of which is respectfully submitted,

September 21, 1910.

CHAS. E. OTIS,

Special Master.

*173 UNITED STATES CIRCUIT COURT.

DISTRICT OF MINNESOTA.

THIRD DIVISION.

(In Equity.)

DAVID C. SHEPARD,

Complainant,

v.

NORTHERN PACIFIC RAILWAY COMPANY. GEORGE T. SIMPSON (substituted in place of Edward T. Young), IRA B. MILLS, CHARLES F. STAPLES, CHARLES E. ELMQUIST (substituted in place of William E. Young), E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD AND ADOLPH MICHAUD.

Defendants.

DECREE

*174 The above entitled cause was submitted to the Master on arguments by Messrs. Robert Thorne, Jared How, Pierce Butler and Hale Holden, solicitors on behalf of Complainant, and by Messrs. George T. Simpson, Edward T. Young, Thomas D. O'Brien and Edmund S. Durment, solicitors on behalf of Defendants other than the Railway Companies.

After deliberation it is ORDERED, ADJUDGED AND DECREED:

Section 1. That the Acts of the Legislature of the State of Minnesota approved April 4, 1907, and April 18, 1907, respectively, and each of them, and the said Orders of the Railroad and Warehouse Commission of the State of Minnesota of September 6, 1906, and of May 3, 1907, respectively, and each of them, recited in the Bill of Complaint, operate as a burden upon and an interference with, a regulation of and an unjust

discrimination against commerce between the states conducted and carried on over and upon the lines of railway of the Defendant the Northern Pacific Railway Company, and said Acts and Orders and each of them are confiscatory and constitute an attempt to deprive the Complainant and the said Railway Company of his and its property without due process of law and to deny him and it the equal protection of the law, and to impose upon said Railway Company and its officers, agents and employes unjust, severe and grossly excessive fines and penalties amounting to a denial of the equal protection of the law and therefore said Acts and Orders are, and each of them is, hereby declared to be in violation of the Constitution of the United States and are, and each of them is void and of no effect so far as the said Northern Pacific Railway Company, *175
its officers, directors, agents and employes are concerned, and that said Northern Pacific Railway Company, its officers, directors, agents and employes, be and they are, and each of them is, hereby permanently enjoined and restrained from continuing to observe or keep in force the tariffs fixed by the said Orders of September 6, 1906, and May 3, 1907, or the passenger rates set forth and prescribed in said Act of April 4, 1907, or from publishing or adopting the tariffs, rates or charges set forth and prescribed in said Act of April 18, 1907, or from reducing its tariffs, rates and charges to the tariffs, rates and charges set forth in said Act.

Section 2. That said George T. Simpson, Attorney General of the State of Minnesota, and Ira B. Mills, Charles F. Staples and Charles E. Elmquist, constituting the Railroad and Warehouse Commission of said State, be and they are, and each of them is, hereby permanently enjoined and restrained from any attempt to compel the said Railway Company to continue to observe, publish, post or put in force the rates, tariffs and charges prescribed by the said Orders of September 6, 1906 and May 3, 1907, and that they are, and each of them is, fur-

ther permanently restrained and enjoined from taking any action, step or proceeding against said Railway Company, or any of its officers, directors, agents or employes to enforce any fines, penalties or punishments for the violation by them of said Orders of September 6, 1906 and May 3, 1907.

Section 3. That said George T. Simpson, the Attorney General aforesaid, be and he is hereby enjoined and restrained from taking or causing to be taken any action, step or proceeding against the said Railway Company, or its officers, directors, agents or employes to enforce the penalties and pun-
*176 ishments specified in said Acts of April 4, 1906, and April 18, 1907, or either of them.

Section 4. That said defendants E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph Michaud, and all other shippers of freight over the lines of said Railway Company, and all others making use of said lines of railway, be and they are, and each of them is, hereby permanently enjoined and restrained from instituting or causing to be instituted any action or proceeding for any violation of the said Acts or Orders, or any of them.

Section 5. That the Complainant recover of the Defendants George T. Simpson, Attorney General of the State of Minnesota, and Ira B. Mills, Charles F. Staples and Charles E. Elmquist, constituting the Railroad and Warehouse Commission of said State, the costs of the suit to be hereafter taxed.

Section 6. This decree shall take effect and be in force from and after the ———— day of ————.

———

UNITED STATES CIRCUIT COURT. *177

DISTRICT OF MINNESOTA.

THIRD DIVISION.

(*In Equity.*)

EMMA B. KENNEDY, ROBERT ELIOT TOD, ROBERT W. DE FOREST and WILLIAM STEWART TOD, executrix and executors, respectively, of the Will of JOHN S. KENNEDY, deceased, and HENRY F. DIMOCK,

Complainants,

v.

GREAT NORTHERN RAILWAY COMPANY, GEORGE T. SIMPSON (substituted in place of Edward T. Young), IRA B. MILLS, CHARLES F. STAPLES, CHARLES E. ELMQUIST (substituted in place of William E. Young), WALTER SCOTT, H. P. WEBB, JOHN PALM, L. LARSON, TOM GUNNESS and S. S. GLARUM,

Defendants. } (*Consolidated.*)

HENRY A. JAMES,

Complainant,

v.

GREAT NORTHERN RAILWAY COMPANY, GEORGE, T. SIMPSON (sustituted in place of Edward T. Young), IRA B. MILLS, CHARLES F. STAPLES, CHARLES E. ELMQUIST, (substituted in place of William E. Young), WALTER SCOTT, H. P. WEBB, JOHN PALM, L. LARSON, TOM GUNNESS and S. S. GLARUM,

Defendants.

DECREE

*178 The above entitled cause was submitted to the Master on arguments by Messrs. Robert Thorne, Jared How, Pierce Butler and Hale Holden, solicitors on behalf of Complainants, and by Messrs. George T. Simpson, Edward T. Young, Thomas D. O'Brien and Edmund S. Durment, solicitors on behalf of Defendants other than the Railway Companies.

After deliberation it is ORDERED, ADJUDGED and DECREED:

Section 1. That the Acts of the Legislature of the State of Minnesota approved April 4, 1907, and April 18, 1907, respectively, and each of them, and the said Orders of the Railroad and Warehouse Commission of the State of Minnesota of September 6, 1906, and of May 3, 1907, respectively, and each of them, recited in the Bill of Complaint, operate as a burden upon and an interference with, a regulation of and an unjust discrimination against commerce between the states conducted and carried on over and upon the lines of railway of the Defendant the Great Northern Railway Company, and said Acts and Orders and each of them are confiscatory and constitute an attempt to deprive the Complainants and the said Railway Company of their and its property without due process of law and to deny them and it the equal protection of the law, and to impose upon said Railway Company and its officers, agents and employes unjust, severe and grossly excessive fines and penalties amounting to a denial of the equal protection of the law and therefore said Acts and Orders are, and each of them is, hereby declared to be in violation of the Constitution of the United States and are, and each of them is void and of no effect
*179 so far as the said Great Northern Railway Company, its officers, directors, agents and employes are concerend, and that said Great Northern Railway Company, its officers, directors, agents and employes, be and they are, and each of them is,

hereby permanently enjoined and restrained from continuing to observe or keep in force the tariffs fixed by the said Orders of September 6, 1906, and May 3, 1907, or the passenger rates set forth and prescribed in said Act of April 4, 1907, or from publishing or adopting the tariffs, rates or charges set forth and prescribed in said Act of April 18, 1907, or from reducing its tariffs, rates and charges to the tariffs, rates and charges set forth in said Act.

Section 2. That said George T. Simpson, Attorney General of the State of Minnesota, and Ira B. Mills, Charles F. Staples and Charles E. Elmquist, constituting the Railroad and Warehouse Commission of said State, be and they are, and each of them is, hereby permanently enjoined and restrained from any attempt to compel the said Railway Company to continue to observe, publish, post or put in force the rates, tariffs and charges prescribed by the said Orders of September 6, 1906, and May 3, 1907, and that they are, and each of them is, further permanently restrained and enjoined from taking any action, step or proceeding against said Railway Company, or any of its officers, directors, agents or employes to enforce any fines, penalties or punishments for the violation by them of said Orders of September 6, 1906, and May 3, 1907.

Section 3. That said George T. Simpson, the Attorney General aforesaid, be and he is hereby enjoined and restrained from taking or causing to be taken any action, step or proceeding against the said Railway Company, or its officers, directors, agents or employes to enforce the penalties and punishments specified in said Acts of April 4, 1906, and April 18, 1907, or *180 either of them.

Section 4. That said defendants Walter Scott, H. P. Webb, John Palm, L. Larson, Tom Gunness and S. S. Glarum, and all other shippers of freight over the lines of said Railway Company, and all others making use of said lines of railway, be and they are, and each of them is, hereby permanently en-

joined and restrained from instituting or causing to be instituted any action or proceeding for any violation of the said Acts or Orders, or any of them.

Section 5. That the Complainants recover of the Defendants George T. Simpson, Attorney General of the State of Minnesota, and Ira B. Mills, Charles F. Staples and Charles E. Elmquist, constituting the Railroad and Warehouse Commission of said State, the costs of the suit to be hereafter taxed.

Section 6. This decree shall take effect and be in force from and after the ———————— day of ————————.

———————————

UNITED STATES CIRCUIT COURT. *181

DISTRICT OF MINNESOTA.

THIRD DIVISION.

(*In Equity.*)

WILLIAM SHILLABER,

Complainant,

v.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, GEORGE T. SIMPSON (substituted for Edward T. Young), IRA B. MILLS, CHARLES F. STAPLES AND CHARLES E. ELMQUIST (substituted for William E. Young),

Defendants.

DECREE

The above entitled cause was submitted to the Master on *182 arguments by Messrs. Robert Thorne, Jared How, Pierce Butler and Hale Holden, solicitors on behalf of Complainant, and by Messrs. George T. Simpson, Edward T. Young, Thomas D. O'Brien and Edmund S. Durment, solicitors on behalf of Defendants other than the Railroad Company.

After deliberation it is ORDERED, ADJUDGED and DECREED:

Section 1. That the Acts of the Legislature of the State of Minnesota approved April 4, 1907, and April 18, 1907, respectively, and each of them, and the said Order of the Railroad and Warehouse Commission of the State of Minnesota of September 6, 1906, recited in the Bill of Complaint, operate as a burden upon and an interference with, a regulation of and an unjust discrimination against commerce between the states conducted and carried on over and upon the lines of railway of the De-

fendant the Minneapolis & St. Louis Railroad Company, and said Acts and Order and each of them are confiscatory and constitute an attempt to deprive the Complainant and the said Railroad Company of his and its property without due process of law and to deny him and it the equal protection of the law, and to impose upon said Railroad Company and its officers, agents and employes unjust, severe and grossly excessive fines and penalties amounting to a denial of the equal protection of the law, and therefore said Acts and Order are, and each of them is, hereby declared to be in violation of the Constitution of the United States and are, and each of them is, void and of no effect so far as the said Minneapolis & St Louis Railroad Company, its officers, directors, agents and employes are con-
*183 cerned, and that said Minneapolis & St. Louis Railroad Company, its officers, directors, agents and employes, be and they are, and each of them is, hereby permanently enjoined and restrained from continuing to observe or keep in force the tariffs fixed by the said Order of September 6, 1906, or the passenger rates set forth and prescribed in said Act of April 4, 1907, or from publishing or adopting the tariffs, rates or charges set forth and prescribed in said Act of April 18, 1907, or from reducing its tariffs, rates and charges to the tariffs, rates and charges set forth in said Act.

Section 2. That said George T. Simpson, Attorney General of the State of Minnesota, and Ira B. Mills, Charles F. Staples and Charles E. Elmquist, constituting the Railroad and Warehouse Commission of said State, be and they are, and each of them is, hereby permanently enjoined and restrained from any attempt to compel the said Railroad Company to continue to observe, publish, post or put in force the rates, tariffs and charges prescribed by the said Order of September 6, 1906, and that they are, and each of them is, further permanently restrained and enjoined from taking any action, step or proceeding against said Railroad Company, or any of its officers,

directors, agents or employes to enforce any fines, penalties or punishments for the violation by them of said Order of September 6, 1906.

Section 3. That said George T. Simpson, the Attorney General aforesaid, be and he is hereby enjoined and restrained from taking or causing to be taken any action, step or proceeding against the said Railroad Company, or its officers, directors, agents or employes to enforce the penalties and punishments specified in said Acts of April 4, 1906, and April 18, 1907, or *184 either of them.

Section 4. That the Complainant recover of the Defendants George T. Simpson, Attorney General of the State of Minnesota, and Ira B. Mills, Charles F. Staples and Charles E. Elmquist, constituting the Railroad and Warehouse Commission of said State, the costs of the suit to be hereafter taxed.

Section 5. This decree shall take effect and be in force from and after the ———— day of ————.

INDEX.

	Page.
STATEMENT OF FACTS	1-47
Notes on Master's preliminary statement	8-19
Explanatory—Difference between reduction in rates and reduction in revenue	19-32
Decrees appealed from—Value—Apportionment—Net return	32-46
ASSIGNMENTS OF ERROR	48-58
SYNOPSIS OF ARGUMENT	59
BILL OF COMPLAINT IN NORTHERN PACIFIC CASE DOES NOT ALLEGE CONFISCATION	62
NO CAUSE OF ACTION AS TO MERCHANDISE RATES	66-71
Legal effect of Commission's order	70
VALUATION OF PROPERTY AND BASIS FOR COMPUTATION OF RATES	72-243
Fair value as a basis for rates	75
Character of railroads and railroad property	76
Return should be computed on investment only	79
Reason for showing values of physical properties	92
The inventory should include only property contributed by the carrier	93
How property should be divided	95
Considerations ignored	95
Physical values claimed by the state	97

Table comparing Master's finding with appellant's claim of value..... 104
Evidence for State compared with evidence for complainant 113

ELEMENTS OF VALUE 118-137
Original Cost of Construction 118
No evidence of cost in Minnesota..... 119
Failure to show cost fatal 121
Master's findings of cost 121
Refusal to show original cost..... 124

STOCKS AND BONDS 127-137
Complainants' refusal to furnish evidence of property represented by capital stock 130
Northwestern Improvement Company. 130

A RAILROAD CANNOT INSIST UPON A RETURN WHICH IS EXCESSIVE IF BASED UPON ITS CAPITAL STOCK 133
Statement of counsel for complainants. 134

RETURN ON CAPITALIZATION 136

PROPER METHOD FOR ESTIMATING REPLACEMENT 138-146
The method as considered by Interstate Commerce Commission 141

REPRODUCTION NEW—ANALYSIS OF TESTIMONY AND FINDINGS 147-243
Claim of land values by Northern Pacific (Cooper's Exhibit 9), compared with findings 160
Exhibit 9, Cooper, included large acreage which cannot be considered in arriving at fair value upon which to base rates 161

Title in granted right-of-way 166
Land acquired by condemnation..... 170
Land purchased for future use..... 171
Land in public streets 176

No Evidence of Market Value 178

Illustration of Multiples on Great Northern Lands 188

Evidence of Overvaluation 189

Reproduction Cost Compared With Ordinary Values 191

Properties Other Than Land 195-229
Testimony as to method 197-204

How Unit Prices Were Arrived at..... 204

Depreciation 209

Property Obtained by Use of Earnings... 213

Particular Items—
Engineering, &c. 220
Contingencies 222
Interest during construction 223
Bridges built by municipalities 224

Terminal Companies — Cost Compared With Value Allowed 226

No Evidence That "Reproduction Cost" is Present Value 230

Effect on Rates if Reproduction Method is Established 239

Table Applying Method to Railroads of United States 241

INTERFERENCE WITH FEDERAL POWER.....244-322
Instances 246
Transportation Districts 251
Erroneous legal assumptions 258
Division of sovereign power between Nation and States 259
Difference between Interstate and Intrastate Commerce 265
Safety appliance decision 265
Distinction of the two classes as shown by the decisions 268

DISCRIMINATION BETWEEN LOCALITIES UNDER INTERSTATE COMMERCE ACT 270
Construction of Constitution 271
Discrimination 274
Who can raise question 274
The Ames Case 282
The Eubank Case 283

PRESUMPTION OF REASONABLENESS 285

INTERFERENCE IN FACT, THOUGH NOT IN LAW 289

OPINIONS OF OTHER FEDERAL CIRCUIT JUDGES IN RECENT CASES 294

RELATIVE FAIRNESS AND EQUALITY OF RATES 301

GENERAL CHARACTERISTICS OF TARIFFS 305
Extension of Minnesota tariffs..... 308
Testimony analyzed 312
Findings by Interstate Commerce Commission 319

CONFISCATION—WHAT IS 323-334
Difference between taking property and regulating income 327

Measure of rights of railroads..... 331
Express earnings 332
Statistics showing increase in business. 333
Earnings on all business as found..... 334

APPORTIONMENT OF VALUE 335-389
(A) Apportionment between Passenger and Freight 335
Lack of mathematical certainty 336
*Quantity in transportation 338
Why unfairness to passenger business is advantage to Railroad Company.... 353
The Master's apportionment of value was not based on value of use..... 354
What rates, fares or the gross earnings represent 359
Division of common items by railroads themselves 360
Computations of locomotive and car miles 363
(B) Apportionment between State and Interstate 377

APPORTIONMENT OF OPERATING EXPENSES... 390
Between passenger and freight..... 396
Between state and interstate..... 403
Through and local business defined... 404
Relative cost 408
Long and short haul..... 416
Statistics 419
Failure to produce accounts 421
Hillman's tables 5 and 6..... 426
Master's findings 430
Cost of through and local trains..... 433
Cost on branch lines 439
Testimony as to cost 442

Difference in Passenger Cost 451
Equated revenue basis 452
Higher rates for short hauls..... 462

THE PRESCRIBED RATES WERE ADEQUATE... 464

COSTS CANNOT BE TAXED AGAINST APPELLANTS 473

CONCLUSION 475

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 599.

GEORGE T. SIMPSON, IRA B. MILLS, CHARLES F. STAPLES and CHARLES E. ELMQUIST,
Appellants,

vs.

DAVID C. SHEPARD,
Appellee.

No. 600.

GEORGE T. SIMPSON, IRA B. MILLS, CHARLES F. STAPLES and CHARLES E. ELMQUIST,
Appellants,

vs.

EMMA B. KENNEDY, ROBERT ELIOT TOD, ROBERT W. DeFOREST and WILLIAM STEWART TOD, executrix and executors of the Will of JOHN S. KENNEDY, Deceased,
Appellees.

Consolidated.

GEORGE T. SIMPSON, IRA B. MILLS, CHARLES F. STAPLES and CHARLES E. ELMQUIST,
Appellants,

vs.

HENRY A. JAMES,
Appellee.

No. 601.

GEORGE T. SIMPSON, IRA B. MILLS, CHARLES F. STAPLES and CHARLES E. ELMQUIST,
Appellants,

vs.

WILLIAM SHILLABER,
Appellee.

STATEMENT OF FACTS.

The italics in this brief are ours unless otherwise indicated.

Each of these suits is here upon an appeal from a decree entered therein in favor of complainant, in the Circuit Court of the United States for the District of Minnesota (third division). Each suit was brought on behalf of a railroad doing business in Minnesota, by a stockholder thereof, under rule 94 in equity, and in each the railroad company on whose behalf it was brought, the Attorney General and the Railway Commission of the state were made defendants. The complaint in each suit charges that certain intrastate freight rates and passenger fares prescribed by the state for all the railroads doing business therein, are void, first because they conflict with the federal commerce power, and secondly because they are confiscatory under the fourteenth amendment. The railway companies on whose behalf the suits were brought are as follows:

Number 599, Simpson v. Shepard, Northern Pacific Railway Company.

Number 600, Simpson v. Kennedy, et al, Great Northern Railway Company.

Number 601, Simpson v. Shillaber, Minneapolis and Saint Louis Company.

The Attorney General and the members of the Railway Commission of the state were made defendants solely because of their official positions; the only defense to the suits was made by them on behalf of the state, and they are the only appellants. In the interest of conciseness, we will, with

the Court's leave, refer henceforward in this brief to the different suits by the name of the railway company on whose behalf it was brought.

Technically there are four tariffs involved, but actually only three, as follows:

1. Tariff of merchandise class rates, Railway Commission's order dated September 6th, 1906, effective November 15th, 1906.
   Supplementary order to above, prescribing in-rates on carload merchandise to small distributing points, dated May 3rd, 1907.
2. Two cent fare law, Chapter 176, Laws 1907, effective May 1st, 1907.
3. "Commodity" schedule, Chapter 232, Laws 1907, effective June 1st, 1907.

The freight schedules referred to covered a large part, but not all of the intrastate rates of the companies. The merchandise schedules and the basis for the "commodity" schedule, were prescribed by the state railway commission, whose duties and powers as to intrastate commerce are in all respects similar to the duties and powers of the federal commission as to interstate commerce.

The Legislature enacted the two cent fare, and an anti-pass law, so as to put this state practically on the same passenger basis as existed then, and exists now in the adjoining states of Wisconsin and Iowa.

The establishment of the freight tariffs was preceded by a long and painstaking investigation, by the Commission, of which the carriers had notice and in which they participated.

The merchandise tariffs and the passenger rates were duly adopted and put into effect by all the railroads in the state.

After such adoption, and on December 14th, 1906, the Commission, pursuant to investigation, promulgated a "commodity" tariff to be effective January 26th, 1907. The railroads affected, early in January, 1907, sued out a temporary injunction against the Commission's commodity tariff, but asked no relief as to the merchandise rates, and thereupon, as a supposed compromise of the difficulty, the legislature which met that month took the commission's commodity schedule, applied a level raise of ten per cent to the rates therein, and enacted it as a law, being chapter 232, of the laws of that year, effective June 1st, 1907, and thereupon said suits abated.

Just before the date for the taking effect of the last mentioned and instant commodity schedule, these and six other suits were simultaneously commenced on behalf of each of the nine railroads doing business in the state, in each of which an injunction was asked against *all of the rates prescribed by the state*, the merchandise and passenger, as well as the commodity tariffs, on the grounds, first, that each of the rates interfered with the federal commerce power, and second, that they were each confiscatory.

At the preliminary hearing the Circuit Court refused to grant a temporary injunction against the tariffs that had been adopted and put into effect by the companies, but granted a temporary injunction

against the "commodity" schedule, Vol. 1, p. 99, N. P. Record (No. 599). The temporary injunctions were granted solely on the ground that the affidavits presented made a sufficient prima facie showing that the commodity rates would be confiscatory, the court specifically holding, however, that the rates did not and could not interfere with the federal commerce power. (Same record, page 100).

Of the suits so last commenced these three were tried as typical and presenting in their strongest light the points urged by the companies as to the invalidity of the rates; the other suits are in abeyance.

Testimony was taken and a separate record made in each of the cases tried, but it was agreed at the trial that anything in the record of either could be used in the others, so far as it was applicable. Vol. 4, page 1752 G. N. Record (No. 600). The cases were argued, submitted and decided together in the court below, all being included in a single report by the Master, Vol. 1, p. 181, N. P. Record (No. 599), and only one opinion being rendered as to the three cases by the Court. Vol. 1, p. 379 N. P. Record (No. 599). Separate decrees, however, were entered, and separate appeals taken but they can all be disposed of here as a single case as the questions involved and the errors complained of are substantially the same in each. The printed record in each case is complete in itself. Vol. 1 in each containing a copy of the Master's report and the opinion of the Circuit Court.

There are nine railway systems operating in the State of Minnesota, each of which is carrying on both interstate and intrastate commerce.

Prior to the promulgation by the state of the tariffs here involved, the rates and fares charged by the companies had been made by themselves and in making them the classification of commerce into interstate and intrastate was entirely ignored. While rates were by no means uniform under similar circumstances for equal distances on different roads, or even on the same road, it was true in a general way, that in making the schedules state lines had been ignored, and the same schedules applied indiscriminately to interstate and intrastate traffic. The state has had a Railroad and Warehouse Commission since the year 1887, possessing powers and duties with reference to intrastate commerce, in all respects similar to the powers and duties of the Interstate Commerce Commission with reference to interstate commerce. Since the creation of the commission many complaints of rates in particular localities in the state were adjusted through the requests or orders of the Commission, but prior to 1906 there had been no attempt by the Commission to equalize rates throughout the state or to prescribe tariffs for intrastate business, of state-wide application. Through the effect of merely local adjustments, and because of discriminations created by the railroad made schedules, the rates in the state in 1905 were intolerably unequal and discriminatory as shown by the exhibit prepared by Charles F. Staples, a mem-

ber of the state commission, marked 3-D Staples (Vol. 9, Case No. 599), from which we give the following short excerpt, as to the rates on grain and livestock, the principal products of the state, from the Twin Cities to the station on each road nearest to 100 miles; this will give 101 miles on the Northern Pacific and M. & St. L., and 102 miles on the Great Northern:

	GRAIN				LIVESTOCK		
	Flax	Wheat	Coarse Grain	Lumber	Cattle	Hogs	Sheep
G. N.....	7	7	7	8.5	12	14.5	12
N. P.....	7.5	7.5	7.5	9.5	12.5	15.75	12.5
M. & St. L.	10	10	8	9	12	12	12

The legislature of the state, at its 1905 session appointed a committee to inquire into the rate situation, in co-operation with the Commission. They were informed of the above irregularities and inequalities in rates, and of the further fact that the intrastate rates were being constantly changed by the filing of temporary discriminatory rates, without notice to the commission, as favors to certain shippers, the tariff to expire as soon as the shipper, intended to be favored, had accomplished the purpose intended. The practice referred to was illustrated by Mr. Staples, by his exhibit marked 3-C Staples (Vol. 9, Case No. 599), where he shows the terms, date of filing and of expiration of several temporary tariffs. These temporary tariffs came to be known opprobiously as "midnight rates" because they were made, enjoyed by the beneficiary and expired, in secrecy.

As a result of the investigation showing the above facts, and the further fact that the volume of the transportation business in the state had enormously increased in the preceding decade, the legislature enacted Chapter 176 of the Laws of 1905, (appendix A, this brief) forbidding *any change* in freight rates thereafter, without the consent of the Commission, and also adopted Chapter 350 of the session laws of that year (appendix B, this brief), specifically directing the Railroad and Warehouse Commission to make a complete investigation with a view to securing a more uniform system of rates in the state, and a substantial reduction therein.

The law of the state under which the Railway Commission acted and a statement of the various steps taken by both the Commission and the legislature, is contained in that part of the report of the Master, commencing at Vol, 1, page 186, N. P. Record (No. 599), from which we take the following excerpts:

> "By Chapter 28 of the Revised Laws of Minnesota, 1905, being legislation originally enacted in 1887, as amended in 1901, the general supervision of railroad and express companies doing business in the State of Minnesota as common carriers, and all public warehouses, is vested in a board of three members known as Railroad and Warehouse Commission, with power to adjust and fix rates and prescribe rules and regulations for the conduct of the business of such companies, and fines and penalties are by said act prescribed for failure to comply therewith. The here material sections of said act are as follows:

'1969. Complaint that rate is unreasonable —duty of Commission—Upon the verified complaint of any person or of any corporation, private or municipal, that any tariff of rates, fares or charges, or any part thereof, or of any classification is unequal or unreasonable, the commission shall proceed to investigate the matters alleged in such complaint; and for the purposes of such investigation they may require the attendance of witnesses and the production of books, papers and documents. If, upon the hearing, such tariff of rates, fares, or charges, or any part thereof, or of such classification, is found to be unequal or unreasonable, the commission shall make an order stating wherein the same are so unequal or unreasonable, and shall make a tariff of rates, fares, charges and classifications which shall be substituted for the tariff so complained of. The tariff so made by the commission shall be deemed prima facie reasonable in all courts and shall be in full force during the pendency of any appeal or other proceedings to review the action of the commission in establishing the same.

'1970. Investigation without complaint— The Commission shall also of its own motion investigate any matter relating to the management by any such carrier or warehouseman of its business or the reasonableness of any rates, fares, charges, or classifications, whenever, in its judgment, the public interests require it, and in such case the procedure shall be, as nearly as may be, as provided upon the filing of a complaint, and the findings and order in such case shall have the same effect as those made upon complaint.'"

(Note: It should be added that the state law allows an appeal by the carrier affected, from any order of the Commission, direct to the Courts, on the ground that the regulation or rate prescribed

is unreasonable. § 1971 Revised Laws of Minnesota 1905, as amended by Ch. 167, Laws 1907.)

The Master continues:

> "During the 1905 legislative session of Minnesota, a joint resolution of the House and Senate was passed, approved April 14, 1905, (Session Laws 1905, Chapt. 350), directing the Railroad and Warehouse Commission 'to undertake the work of securing a readjustment of the existing freight rates in this state which will give a more uniform system of rates throughout the state, and a uniform scale of percentages which each class rate shall bear to the first class, the readjustment to secure a substantial reduction in the existing merchandise rates.' * * *"

The causes leading to the adoption of the resolution are further discussed in the testimony of Mr. Staples, a member of the State Railway Commission, Vol. 6, p. 2609-2622 N. P. Record (No. 599).

The Master continues:

> "At the same session of the Legislature, by Chapter 176 of the laws of that year, railroad companies within the state *were prohibited from changing any state rate except upon application to the Commission and its consent obtained.* Theretofore it had been the practice of such carriers to increase or reduce their rates at will without previous notice and free from governmental control."
>
> * * * * *

The Master, p. 188:

> "After the legislation of 1905, and pursuant thereto, the Commission made an extended investigation of the so-called merchandise rates charged by all railroad companies throughout the state doing business therein for the transportation of freight merchandise between points in Minnesota, without, however, making

a physical valuation of the properties employed in such service, and made up and completed full schedules of rates covering all merchandise transportations and notified such railroad companies to show cause why such schedule should not be promulgated as a maximum schedule of rates for all said railroads between points within the state."

"Pursuant to such notice public hearings were had before the Commission, extending over a period of several months, in which the railroad companies appeared and took an active part and submitted a large amount of testimony with reference to the matters under consideration, sufficient in the opinion of the Commission to enable it to act intelligently in the premises, and thereupon, on September 6, 1906, it made and served an order on all of said railroad companies" (prescribing the schedule of merchandise rates in controversy) "to take effect November 15, 1906, a true and correct copy whereof is annexed to and made part of the bills of complaint in these cases."

Appendix C of this brief.

"Thereafter on May 3, 1907, said commission in like manner made and served on all the defendant railroad companies an order supplemental to said order of September 6, 1906, a copy of which is annexed to the bills of complaint herein and made part thereof, and was made for the purpose of securing more favorable in-rates to a number of jobbing centers other than the eastern terminals of St. Paul, Minneapolis and Duluth, and was so made pursuant to a provision of the order of September 6, 1906, in the form of a note thereto, to the effect that such action would be taken if further satisfactory adjustments should not be made by the railroad companies."

This order is appendix D of this brief.

The Master, p. 189:

> "By the Western Classification, so-called, and to which reference is made in said orders, substantially all commodities and property which are the subject of transportation are classified and arranged in groups with reference to their general character and value and the cost of transportation thereof, and such classification, with modifications, from time to time made therein, has long been used by common carriers in the West and Northwest as a basis for fixing rates, the commodities of each class taking the same rates under like conditions. In Minnesota, however, a large number of commodities, amounting to several hundred, have, by the intervention of the Commission been removed from such Western Classification and given special rates known as Commodity Rates, or reduced in class so that the Western Classification in operation in Minnesota is very materially different in many respects from the Western Classification in general use as a basis of rates in other states." * * *

(Note: By way of further explanation of the purpose of the "Western Classification" referred to, it should be stated that the carriers formulating the same, adopted for use in this territory certain terminal and distance tariffs, one for the articles included in each class; the terminal tariffs being the rates to and from large distributing centers, and the distance tariff applying between all other stations. The "distance" tariffs formerly maintained were also irregular but generally higher than the terminal rates; by the Commission's order they were fixed at 105% of the "terminal" tariffs, for the same distances. Vol. 2, p. 532, M. & St. L. Record (No. 601).

But for many years commodities which regularly moved in large quantities in carload lots—such as cattle, coal, grain and lumber have been carried at lower rates than those prescribed in the regular distance and terminal tariffs for the classes to which they respectively belong, and these special rates have become known in railroad terminology as "commodity rates."

Tittemore, Vol. 2, pp. 137-8, M. & St. L. Record (No. 601).

A revision of the class rates of the companies therefore would not have changed the rates on which "commodities" actually moved, so that after promulgating the class tariffs, the commission prescribed a new and separate schedule for the "commodities" which latter schedule is called herein the "commodity rates.")

The Master, p. 190:

> "The rates prescribed are maximum terminal rates, and may be increased by five per centum for shipments between stations neither of which is a terminal or distributing station.
>
> It appears from the evidence that the rates so prescribed for the first four classes apply alike to merchandise shipments in carload or in less than carload lots, but as to all the other classes they apply only to shipments in carload lots."
>
> "The reduction in merchandise rates made by the order of September 6, 1906, was from 20 per cent to 25 per cent, but notwithstanding the extent of the reduction all the railway companies interested put the rates prescribed by the order into effect on the 15th of November, 1906, and they ever since have been and still are maintained by all the companies concerned, as maximum rates for the transporta-

tion within the state of merchandise covered by the order.

The same is also true with reference to the rates prescribed in the Commission's supplemental order of May 3, 1907, from and since its issuance, which supplemental order, in the Northern Pacific case, effected a reduction of 13.577 per cent in the rates upon the traffic affected by it. To what extent it affected traffic rates in the Great Northern case *does not appear.* In the Minneapolis & St. Louis case no relief is asked on account of it."

(Note: Before the new merchandise schedule was prescribed by the Commission, the railroads had established intrastate rates somewhat below the regular schedule for in-shipments in carload lots to a few small cities in the Northern part of the state where jobbing was carried on in a small way. The so-called class schedule prescribed by the Commission went into effect November 15th, 1906, and on May 3rd, 1907, on the petition of the local jobbers in said small cities, the Commission made the supplementary order restoring the same relative in-rates, under the new merchandise schedule, as had existed under the old one. Staples, Vol. 6, p. 2750, N. P. Record, No. 599).

The Master further says:

"At the same time that the commission was considering the schedule afterwards incorporated in its order of September 6th, 1906, it was also considering a reduction in rates for transportation within the state of *commodities* in carload lots not covered by the order.

Because of the agitation with regard to commodity rates, the three Northern systems of the state, the Great Northern, Northern Pacific and the Minneapolis, St. Paul and Sault

Ste. Marie Companies voluntarily reduced their rates on grain approximately ten per cent by filing schedules effective September 1st, 1906, and their rates on hard and soft coal at least ten per cent by filing schedules effective October 22, 1906."

(Note: The voluntary reduction referred to was made on August 20, 1906, (Staples, Vol. 6, p. 2746, N. P. Record, No. 599). It applied to neighboring states as well as Minnesota. It was not involved in this controversy; there is no evidence as to why it was made, and it must be presumed to have been made because the carriers themselves believed the existing rates were unreasonably high. It was made during the active investigation being made by the commission, and when the commodity schedule here in controversy was ultimately prepared thereafter by the state, applying to and equalizing the maximum rates *on all roads in the state*, the additional reduction on those articles on the Northern roads (N. P., G. N. and Soo), was very slight.

To show how insignificant was the reduction prescribed upon the northern roads which had thus in August, 1906, voluntarily reduced their rates on grain and coal, we give the following examples taken from Defendant's Exhibit 3-D Staples (Vol. 9, N. P. Record):

WHEAT—Cents per cwt.

	G. N.	N. P.	Chapter 232 Laws 1907
50 Miles	6	6.5	5.7
100 "	7	7.5	7.8
150 "	9	9	8.7
200 " 10.5		10.5	9.6

The Master, p. 190:

> "Notwithstanding these voluntary reductions, and the reductions caused by the order of September 6, 1906, the Commission under date December 14, 1906, effective by its terms January 26, 1907, made *its second order*, reducing rates for transportation within the state of grain, coal, lumber and livestock. The reduction affected averaged from 10 per cent to 28½ per cent or a general average of 17.37 per cent in addition to the voluntary reductions in rates on grain and coal made by the three Northern systems as above recited.
>
> In January, 1907, the railroad companies affected by this *second* order being all that are parties defendant to the nine pending suits as above set forth, procured an injunction from the Circuit Court of the United States for the District of Minnesota forbidding the enforcement by the Commission of its *second order*."

(Note: At that time no complaint was made on behalf of the railroad companies, on account of the *class rates* on merchandise, embodied in the first order which was then in effect by the voluntary act of the companies. Elliott, Vol. 4, p. 1326-1327, N. P. Record, No. 599).

The Master continues:

> "Thereupon the Legislature of the state which convened early in January, 1907, enacted Chapter 232, General Laws of Minnesota

for the year 1907, approved April 18, 1907, and effective by its terms June 1, 1907, fixing a new schedule of commodity rates, *in all respects like the schedule comprehended* in the second order of the Commission, excepting that the reduction in rates provided by it was 10 *per cent less* than that provided by the order—a copy of which legislative enactment is annexed as an exhibit to the bills of complaint, respectively."

See appendix E of this brief.

After a further statement the Master said, Vol. 1, p. 191 (same record):

"The schedule of rates *only applies to shipments in carload lots with minimum weights definitely fixed by the Act.*"

"Meantime and at the same session of the Legislature it had passed the so-called two-cents passenger law, being an Act approved April 4, 1907, effective by its terms May 1, 1907, prescribing as maximum rates for the transportation of passengers within the state 2 cents per mile for passengers of twelve years of age or over together with baggage not exceeding 150 pounds in weight, and one cent per mile for passengers under twelve years of age together with baggage not exceeding 75 pounds in weight. The *maximum* theretofore had been three cents for adult passengers and 1½ cents for persons under twelve years of age."

Appendix F of this brief.

While a separate recital of each of these regulations makes a formidable appearance, they in fact when all taken together amounted to one maximum schedule for freight and one for passenger service. They did not require successive reductions upon any one class or character of service.

Each rate for a given distance is a concrete entire rate for a concrete entire service and if adequate or just as an entirety cannot be made inadequate or unjust by segregating and calling part of it *terminal* and other parts *hauling* charges or by segregating different portions of the haul, nor by applying it upon any theory of extension to any other service or condition.

The Master (p. 191):

> "The defendant railway companies published and put into effect the passenger rates prescribed by said Act on (of) April 4, 1907, and were about to put into effect the commodity rates prescribed by said Act of April 18, 1907, and would have done so had they not been restrained by the writs of injunction issued in these suits. They were apparently influenced in what they did and were about to do *both with respect to the commission's orders* and the Acts of the legislature by the severe penalties denounced by the statutes. * * *"

(Note: This statement as to the reasons for the adoption of the commission's orders seems unwarranted and directly contrary to Mr. Elliott's testimony to which we have already referred, Vol. 4, p. 1326-1327, N. P. Record, No. 599).

By Chapter 136, Laws 1909, the penalties found in Ch. 232, Laws 1907, were repealed.

Appendix E, this brief.

The Master, p. 192:

> "Summarized, the reductions in rates which may be charged by railroad companies for interstate (*intrastate*) transportation within the State of Minnesota so made by its legislature

and commission and challenged by these suits are briefly as follows:

1. Reduction in *maximum rates* on general merchandise amounting to from 20 per cent to 25 per cent. (Commission's order of September 6, 1906).

2. Reduction in *maximum rates* on passengers amounting to 33 1/3 per cent. (Session Laws 1907, Chapter 176).

3. Reduction in *maximum rates* on grain, lumber, livestock and coal, amounting to 7.37 per cent. (Session Laws of 1907, Chapter 232).

4. Reductions in in-rates in (*to*) distributing stations, amounting in the Northern Pacific case to 13.587 per cent. (Commission's order of May 3rd, 1907)."

EXPLANATORY.

The alleged percentages of reductions made by the rates prescribed by the state are stated by the Master in the above form several times in his report to the court, repeated at least five times, and referred to as "sweeping reductions" several times by the Court in its opinion, and we desire most earnestly to call attention to the method adopted by the Master and the learned circuit judge in thus stating reductions in percentages of maximum rates rather than the actual reduction in revenue, which is the real and vital question in determining the inadequacy of the schedules. The form in which the statement is made, is well calculated, though probably not intended to make the reductions look very much greater than they actually were.

The cases were tried with reference to the fiscal year ending June 30th, 1908, during which year all of the tariffs in controversy except the "commodity rates" were in effect, and, therefore, all reductions effected by the rates (except upon commodities) were reflected in the revenues received. There was on that account no need of speculating or estimating either the percentage of reduction, or actual reduction, as to any but the commodity rates; as to the rates which were in effect the only question cognizable by the court was the sufficiency of the revenue. We desire in a few words to explain away the accusation of unreasonableness, which arises by implication at least from the form of the Master's statement as to the extent of the reductions actually made.

Difference Between Reduction of Rates and Reduction of Revenue.

It is entirely clear that there is a wide difference between a reduction of *rates*, and a reduction of *revenue*. The reduction in the company's revenue resulting from the reduction of a rate, depends entirely on the quantity of traffic that moves on that rate on the company's lines. The ordinary railroad "classification" includes everything that is the subject of transportation and rates are prescribed in the tariffs of the companies for each of the classes, which apply to all the articles enumerated therein. But many of the articles so classified and for which rates are so prescribed do not move in the intrastate commerce of this state, or move in such small quan-

tities as to make the revenue therefrom negligible. A serious reduction could be made in such rates, so that expressing the reduction in a percentage of the *rate* reduced would make it look revolutionary, while in fact the company's revenue might be practically or wholly unaffected. A reduction of 50% in the intrastate rate on elephants in Minnesota might not affect the company's revenues to the extent of a single dollar. In cases like these, therefore, where the state is accused of attempting to confiscate property devoted to intrastate transportation, where the question is not the legislative one of fixing rates, but the judicial one of determining the sufficiency of the revenue, *reductions* alleged to have been made, should be expressed either in a gross sum or in percentages of *revenue*, and not in percentages of mere paper rates which mean nothing whatever.

With the disputed passenger and freight rates (except the commodity rates) in effect, the Northern Pacific road (Master's report, Vol. 1, N. P. Record No. 599, pg. 259) earned in the State of Minnesota during the fiscal year 1908, $13,336,046.87. Of this, the intrastate earnings were $2,813,104.35.

The Master found (p. 264, same record) that if the commodity rates which were suspended by the temporary injunctions, had also been in effect during the same fiscal year, the revenues of the company would have been reduced thereby in the sum of $21,493.67, *which is seven-tenths of one per cent of the company's intrastate revenue.* In that case, therefore, if it should appear, as we shall here-

after try to show, that the intrastate revenue actually received by the company during the fiscal year 1908 was ample, the only further question would be as to whether subtracting $21,493.67 therefrom, would confiscate the company's property, because as before stated all other rates were in effect. But, as the Master's statement of reductions would indicate that the revenue actually received must necessarily be greatly below what it would have been had the rates not been reduced by the state, we feel justified in extending this explanation a little further so as to show what the company's exhibits and testimony disclose on that question.

PASSENGER TRAFFIC.

Prior to the enactment of the two-cent fare law by the legislature the different railroad companies were maintaining in this state a variety of unrelated passenger rates ranging from three cents per mile, the maximum, to a minimum lower than one cent per mile. The ordinary one way passenger was required to pay three cents, while those who purchased "1,000-mile" tickets were carried at two cents; clergymen were carried at one and one-half cents and round trip excursion tickets were sold at two cents at all times to parties of ten or more traveling between the same stations, and to the public individually on certain holidays, or to fairs or conventions, and on other occasions whenever it suited the company's purposes to grant favors. Commutation tickets were sold to suburban and

lake resorts at arbitrary rates, sometimes below one cent per mile, Scott, Vol. 3, p. 569, M. & St. L. Record (Simpson v. Shillaber, No. 601), and until passes were abolished—by the same legislature that enacted the two-cent fare law,—a large number of travelers were carried free. Mr. Johnson, Assistant Comptroller of the Northern Pacific, showed by his exhibit (55 Johnson, Volume 10, N. P. Record No. 599) that for the reasons stated the average rate per passenger mile received by the company in its intrastate business in Minnesota for the six years prior to the taking effect of the two-cent fare law varied from 2.299 to 2.435 cents. The two-cent fare law permitted a higher charge than the company was making for many of the classes of its passengers, permitted the companies to maintain the rate they habitually charged on "mileage" tickets, but this and the anti-pass law abolished discriminations in favor of the class that was being carried free and against the class that was being charged too much. The *average rate* under the old system above outlined, amounting to 2.35 cents, was reduced by the law only 15% instead of 33 1/3%. But it cannot be determined whether a reduction in revenue was actually effected by merely stating that a *rate* was reduced a certain per cent. Such a statement takes no account of any increase in business that may have been stimulated by the lowering of the rate. In the Northern Pacific case it is made to appear that the increase in the intrastate passenger business more than made up for the lowering of the average

rate. The fact that a reduction of rates has this effect has frequently been recognized by this court. In the case of Chicago G. & T. R. R. v. Wellman, 143 U. S. 339, a case involving a two-cent fare law, this court said, p. 343:

> "* * * Must it be declared, as a matter of law, that a reduction of rates necessarily diminished income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore the earnings? * * *"

The above language is referred to with approval in St. L. & F. R. R. Co. v. Gill, 156 U. S. 649. In the recent case of Willcox v. Consolidated Gas Co., 212 U. S. 19, the late Mr. Justice Peckham, giving a concrete example of how reducing rates increases business, said, p. 51:

> "The elevated railroads in New York when first built, charged ten cents for each passenger; but, when the rate was reduced to five cents, it is common knowledge that their receipts were not cut in two, but that, from increased patronage, the earnings increased from year to year, and soon surpassed the highest sum ever received upon the ten-cent rate.
>
> Of course, there is always a point below which a rate could not be reduced, and, at the same time, permit the proper return on the value of the property; but it is equally true that a reduction in rates will not always reduce the net earnings, but, on the contrary, may increase them."

Table 58-Johnson, appearing in the volume last referred to, shows the revenue from intrastate passenger business under the two cent fare law for nine months of the fiscal year 1908 as compared

with the revenue under the old rates during the same months of the previous fiscal year.

The table shows that, during the test period selected by the company, the intrastate business in Minnesota increased 19.8% and the gross revenue decreased $8,242.93 or 1.1% of passenger revenue, instead of 33⅓% as stated by the Master. If the diminution was stated in percentage of all intrastate revenue it would be only about one-third of one per cent. If the loss for nine months were to be increased by one-third, to represent the loss for a year, the total loss would be $10,990.20. But in order to show this loss, it appears, by dividing the intrastate revenue by the passenger miles, that the company collected from intrastate passengers on the average only 1.93 *cents per mile, while the state law permitted it to collect two cents.* If two cents per passenger mile had been collected, the intrastate revenue for the period covered would have shown a surplus over the intrastate revenue for the previous period with which it was compared, of more than $12,000.00, so that this exhibit shows in fact that the increase in the business more than made up for the reduction in the rate, and there was for that reason no actual loss on the lines of this company in passenger revenue because of the passenger rates fixed by the state.

The state did not require this company to carry any passenger at less than two cents per mile, and it cannot be accused of exceeding its powers under the fourteenth amendment, and *causing* a diminution in the company's revenue when it affirmatively

appears that such diminution arose from the fact that the company voluntarily charged a lower rate than that required by the state law. In a case like this it is incumbent upon the company to show that it charged the full rate allowed by the law of the state, and that *at such rate* the revenue was inadequate. It might be proper here to say that *there is no such proof in this case as to any of the schedules.*

Knoxville v. Knoxville Water Co., 212 U. S., 1.

The table last referred to is the only one furnished by *the company showing the actual results of the two cent fare law in operation* on the Northern Pacific lines.

There are several other tables applying to imaginary conditions which show imaginary losses. For example, by Exhibit 59-Johnson, Vol. 10, N. P. Record, No. 599, it is attempted to be shown what the passenger loss would have been by subtracting the actual revenue received from what it is claimed the revenue would have been on the same volume of traffic, both interstate and intrastate at the *old rates* by an arbitrary application to the business, of the discriminatory rates previously charged by the company. Such a comparison proves nothing whatever. A loss of revenue must be shown by comparing the revenue actually received under the new rates for a fixed period with the revenue actually received under the old rates for a similar period. The company's kind of proof is based on the assumption that it is entitled as of right to whatever constantly increasing income

it can get out of the business, regardless of all questions of the reasonableness or adequacy of rates, and that anything that it could have collected out of the business, if the state had not interposed, was a loss.

As appears by the record, the Circuit Court enjoined the two cent passenger law by its final decree, and we are back under the old system with its multitude of arbitrary discriminations. Again we have excursion rates, commutation rates, land seekers rates, tourist rates, in all their infinite varieties; the companies are selling two cent mileage books and other mileage books at two and one-half cents. The Court by its decree also enjoined the schedule of class rates on merchandise and its supplementary in-rate schedule, so that the entire rate question is back where it started in 1905.

Freight Reductions.

The only "reduction" at all worth mentioning on the Northern Pacific road, resulting from the entire re-adjustment of intrastate rates was effected in the class rates on merchandise. That sum is estimated by the assistant comptroller (Exhibit 63, Johnson, Vol. 10, N. P. Record, No. 599), to have been $97,719.78 for a year which is 3.4% of the intrastate revenue of the company. This loss is only constructive, being the additional amount which the company would have received on the same business at the old rates, and not the difference between what the company received on its merchandise traffic within the state in former years, as

compared with what it received on the same business in the year in controversy, under these rates. It is not to be subtracted from the revenue actually received; it is simply suppositious revenue not received, because the rates were in.

In view of the foregoing facts, it is somewhat surprising to see the parade of percentages of reductions in *maximum rates* stated by the Master, which on their face would seem to indicate that the companies had little intrastate revenue left.

Reduction By Order of May 3, 1907.

But whatever may be said in justification of the other percentages, the Master's statement as to the reduction in "in-rates to distributing centers" is inexcusable. As before explained, the in-rate order was made so as to restore to a few small towns where wholesaling was carried on in a small way, the same relative carload in-rates, from St. Paul, Minneapolis and Duluth, on merchandise under the new rates, as was granted to the same towns by the companies under the old rates.

All the towns affected were situated on the Great Northern or Northern Pacific, and most of them on both, so that as the Master says, *nothing was claimed on account of this order on the M. & St. L. Line.*

In the Northern Pacific case there was no attempt made to show how much business of that class was carried under those rates in carlots to the towns affected. But when Commissioner Staples was on the stand as a witness he was asked

the *percentage of reduction* in those in-rates effected by the order. In response, p. 2756, Vol. VI, N. P. Record, he furnished the exhibit marked Exhibit 69-Staples, appearing in Vol. 10, N. P. Record, (No. 599). The percentage there stated is correctly quoted by the Master (13.577%) but neither the Master nor any one else could tell from that percentage how the company's revenue was affected, unless the volume of the business was also shown, which was not done, on behalf of that company.

The Great Northern, however, made a complete showing on this subject, giving the exact effect of the order on its revenues. This information is contained in Exhibit 22-Parker, Vol. 6, Case No. 600. The Great Northern has a more extensive line in Minnesota and does a larger intrastate business than the Northern Pacific. The foregoing exhibit shows that on all business handled within the state, on the Great Northern and on its connecting lines, for the year ending June 30th, 1908, the "loss" was $765.74. This would be a reduction of 20% on *the business affected*, but when we consider that the Great Northern road earned in the year 1908 in Minnesota $20,275,907.75 (Master's report, page 266, Case No. 599), of which $4,594,-698.10 were intrastate earnings, it can at once be seen how seriously the financial standing of the company was affected by a loss of $765.74. The Master was not justified in giving a *percentage* which required more figures to express than the total amount of the reduction, without being able to show the amount of the reduction in fact in the

Northern Pacific revenue, where the actual reduction must have been less than on the Great Northern, nor in stating that there was no showing on the subject in the Great Northern case, the latter being the only case in which there was an actual showing. This is one of the percentages which the Court refers to in its opinion, as "sweeping." We will discuss the particulars of the reductions, as they applied to the other roads, under the head of confiscation.

When thus reduced to concrete form the reductions attempted and accomplished by the state are something very different from what they seem to be if judged alone by the Master's statement of percentages.

Comparison of Rates.

As there is much in the Master's report, and in the opinion of the Court condemnatory of making intrastate rates lower than interstate rates, we desire also at this time to correct the false impression which might arise from that statement. A scheme of rates for intrastate business lower per unit of service than interstate rates in the same field, would inevitably produce less revenue per unit in the aggregate on the year's business. But it was conceded by the complainants and the Master found as a fact (Vol. 1, p. 267, N. P. Record, No. 599), that on the Great Northern road, for the fiscal year 1908, the gross intrastate revenue was more than twice greater per ton mile than the interstate revenue. His exact language was as follows:

> "During said year the relation of revenue per ton mile derived from intrastate business to the revenue per ton mile derived from the interstate business, was as 2.02894 to 1.0000."

In a similar finding in the Northern Pacific case, the Master states that the relation of intrastate to interstate revenue on that road for the fiscal year 1908 was 1.4387 to 1, (Vol. 1, p. 261, N. P. Record).

The interstate rates for short distances from large terminals in Minnesota to points outside the boundary, are not the rates upon which the interstate business of the company coming into the state from long distances is moved, nor the rates on which the business going out to the far east or the far west is moved. The long distance business is moved within the state, on proportionals of the long haul rates, which are very much below the Minnesota intrastate rates. The instances of disparity beyond the state line where the interstate rates were higher after the intrastate rates were adjusted on a different rate of progression, are the only instances of lower interstate rates involved. We contend, however, that interstate rates fixed by the carriers themselves are no evidence of their own reasonableness and are not to be taken as a standard in fixing intrastate rates.

We shall also show hereinafter, under its proper heading, from the testimony and reports to the state made by the companies themselves that they are now, and have been ever since the rates involved were prescribed, in a highly prosperous condition, not only paying their operating expenses,

which include large annual additions to the property and betterments paid out of earnings, their taxes, their fixed charges on their bonds, the usual large dividends on their stock, but that the Great Northern and Northern Pacific have also carried large sums annually into surplus. We shall show also that of this apparently abundant earning, very much more per mile of road was earned in Minnesota than on the whole line, or on the line outside of Minnesota, and that the net income in Minnesota for the fiscal year 1909, with all but the commodity rates in effect, largely exceeded the income for the year 1908, as to which the cases were tried.

The Decrees Appealed From.

The Master and Court found in each suit, in accordance with the claim of complainants, that all of the rates so prescribed by the state, were invalid, and it was in each suit decreed (See Vol. 1, p. 432, Case No. 599, as to form) that the rates and each of them—

> "Operate as a burden upon and an interference with, a regulation of and an unjust discrimination against commerce among the states * * * and said acts and orders are and each of them is confiscatory and constitutes an attempt to deprive the complainant and the said railway company of his and its property without due process of law, and to deny him and it the equal protection of the law, * * *."

It appears from the opinion of the Court, as we will hereafter more particularly point out that the ground upon which the rates in controversy are

claimed to interfere with, and "regulate" interstate commerce is nof that they directly apply to interstate commerce, but from the claim that these rates from distributing centers within the state to stations upon its border, differ from rates from the same distributing centers to commercially competing points across the boundary of the state, and "require" the railroads to readjust their rates to such outside points, to avoid prohibited "discrimination."

There are, therefore, two controlling questions on these appeals:

1st. Do rates prescribed by a state for its strictly internal commerce interfere with the federal commerce power, regardless of their inherent reasonableness per se, if they differ from interstate rates from common distributing centers to commercially competing points beyond the state's boundary?

2nd. If the rates are not invalid upon the ground above mentioned, are they confiscatory?

Each of these questions gives rise to a large number of subordinate questions, but as the first seems to us to be a question of law, and we will be compelled to discuss the facts in the argument, further reference thereto is deferred.

The second question is one of fact, and its solution depends on several other questions of fact, to which we believe it is proper for us at this time to call the court's attention.

Naturally the primary problem under the second heading above, is to determine the value of the

property employed by the companies in their intrastate service in Minnesota, and after that has been determined, to next find the income of the carriers from that business, and the proportion of their operating expenses incurred in carrying it on.

After finding that the prescribed rates interfered with and burdened interstate commerce, the Master said, Vol. 1, p. 217, N. P. Record No. 599:

> "The question as to whether the orders of the State Commission and the acts of the Legislature complained of constitute such an interference with interstate commerce and operate as a burden thereon by reason of the matters of fact hereinbefore found to exist is, however, not altogether free from doubt, and it is proper therefore, regardless of the views of the Master, that he should proceed to make findings upon all the issues in the case."

Thereupon the Master proceeded to make findings upon the second main division which includes all of the questions arising upon the claim of confiscation.

Here again no distinction was made between the different railways, although, as we confidently assert, the bill of complaint in the Northern Pacific case not only failed to allege that the rates were confiscatory but affirmatively admitted they would not result in confiscating the complainants' or the railways' property, if their operation and effect were confined to Minnesota business. (Amended and supplementary bill of complaint, Par. 13, 14, Vol. 1, pages 138-9, Northern Pacific Record No. 599.)

After discussing the different bases for ascertaining the value of the property the Master said, Vol. 1, page 243, N. P. Record No. 599:

> "The Master is thus confirmed in his opinion that the cost of reproduction new is the fairest and most equitable basis upon which to predicate rates, both for the carrier and the public, and he has accordingly adopted it in these cases."

The formula adopted to find cost of reproduction or replacement was, substantially, that the railway was non-existant and that it was necessary for the company to now acquire, under present conditions, its right-of-way and terminal lands and construct and equip the railway as it now actually exists.

In thus estimating reproduction cost, it was assumed that all lands would necessarily now be purchased and severed from adjoining lands. Upon this assumption the reproduction cost of the lands was found not the present market value, but an amount ranging from 130 to 225% thereof. Master's Report, Vol. 1, pp. 221-225 N. P. Record. Decision, pp. 418-426, same record.

No distinction was made between lands in which the company had a mere easement for right-of-way, acquired by the exercise of eminent domain, lands donated for right-of-way, and land purchased for future use, but not now actually used for transportation purposes. In the case of Northern Pacific there were in Minnesota 9,396.49 acres donated to the company, consisting principally of the right-of-way granted to it by the United States Government. Defendant's Exhibit M-1, Cooper, Vol. 9, N. P. Record No. 599. Cooper's testimony, Vol. 2, same record, pp. 428-436.

Of the terminal lands of the same company about 42% was not devoted to railway purposes but was held for possible future use. Defendant's Exhibit M-Cooper, Vol. 9, N. P. Record.

Mr. Elliott, the President of the Northern Pacific, testified with reference to these lands, Vol. 4, p. 1231 N. P. Record, No. 599:

> "A. Well, in some cases I thought it would be five years before we would utilize it, in others ten, or maybe fifteen."

The area of streets in which the companies had traffic facilities was also included as land. Master's Report, Vol. 1, p. 224, N. P. Record No. 599.

In estimating reproduction cost of items other than lands no allowance was made for depreciation, Master's report, Vol. 1, p. 238, N. P. Record No. 599:

Although fully established that large portions of the items of construction had been paid for out of earnings accounted for as an operating expense, no distinction was made by the Master between property so acquired and that secured by the investment of capital. Darling, Chief Engineer of Northern Pacific, Vol. 7, p. 3227, N. P. Record No. 599, also pp. 3246-7, same record. Hill, Vol. 3, pp. 1326-1341 inclusive, G. N. Record No. 600. Master's Report, Vol. 1, p. 238, N. P. Record 599.

As a cost above the market price was assumed in estimating the replacement value of land, so in estimating the reproduction cost of all items of construction and equipment, it was assumed that the work of reconstruction upon such an extensive scale would tend to "stiffen" or increase prevailing unit

prices. Darling, Vol. 2, pp. 10 and 11, N. P. Record No. 599, also p. 583 same record. Hoagland, Chief Engineer of G. N. road, Vol. 2, pp. 101-2, G. N. Record No. 600, also p. 105 and p. 128, same record; Stevens, Civil Engineer, Vol. 2, pp. 431-2 and pp. 493-4, same record; Master's Report, Vol. 1, pp. 226, N. P. Record 599.

In the case of Minneapolis & St. Louis Railroad there were included the value of bridges crossing the right-of-way and paid for by the City of Minneapolis without the investment of a penny by the Railway Company, the Master saying, Vol. 1, p. 231, N. P. Record No. 599:

> "* * * but as they apparently form a part of street highways, as the law now is, their repair and renewal as required must be borne by the company and the city could not have been compelled to construct them in the first instance if the law had been properly interpreted and observed. * * *"

In each case large sums were added for engineering and legal expenses, contingencies and interest during the period of imaginary reconstruction.

The Master found the amount and market value of the stocks and bonds of the companies. The par value of those securities, as they existed when these actions were commenced, is stated hereafter.

In the cases of the Northern Pacific and Great Northern Railways these securities in part represented properties admittedly not devoted to transportation. Master's Report, Vol. 1, p. 239, N. P. Record No. 599.

Testimony as to the value of those outside properties was wilfully withheld. Elliott, Vol. 8, pp. 3556-3582, inc. N. P. Record No. 599.

The Master also found the original cost of construction of the entire systems of the Northern Pacific and Great Northern Railways. We give his findings in that regard for comparison with his respective estimates of reproduction cost. In each case, however, as will be hereafter shown, the original cost so found by the Master was excessive and not justified by the evidence.

No attempt was made to find the original cost of the portions of these railways in Minnesota.

In the Northern Pacific case, the total investment of private funds was shown. Defendant's Exhibit MM-Gray, Vol. 9, N. P. Record. The values alleged by complainants respectively were—Northern Pacific $350,000,000, Bill of Complaint, XVII, Vol. 1, p. 140, N. P. Record 599. Great Northern $400,000,000, Bill of Complaint, Paragraph VIII, Vol. 1, p. 8, G. N. Record 600.

No finding was made as to the value of the entire system of the Minneapolis & St. Louis. Therefore, this comparison cannot be given as to that road.

Following we present each of these amounts, showing how much reproduction cost as estimated upon the theories and assumptions indulged in, in these cases, exceeds present value determined by any other method.

NORTHERN PACIFIC.

Estimated Reproduction Cost.....$452,666,487.00
Master, Vol. 1, p. 246, N. P. Record.
Actual investment 219,811,715.92
deducting $60,000,000 on
new stock subscriptions.
Defendant's Exhibit MM-Gray, Vol. 9, N. P. Record.
Construction Cost 312,243,555.00
Master, Vol. 1, p. 241, N. P. Record.
Bonds & Stocks 345,000,000.00
Master, Vol. 1, p. 239, N. P. Record, deducting new subscriptions, Ex. 14, Gray, Vol. 10, same record.
Value alleged in complaint..... 350,000,000.00
Vol. 1, p. 138-9, N. P. Record.
Physical value ..... Not found.

GREAT NORTHERN.

Estimated Reproduction Cost $457,121,469.00
Master, Vol. 1, p. 246, N. P. Record.
Construction Cost 295,401,213.00
Master, Vol. 1, p. 242, N. P. Record.
Bonds & Stocks 232,696,439.00
Master, Vol. 1, p. 240, N. P. Record.
Value alleged in complaint..... 400,000,000.00
Vol. 1, p. 8, G. N. Record No. 600.
Physical value ..... Not found.

Each error and false assumption indulged in in estimating the reproduction cost of the entire prop-

erties was included in estimating the reproduction cost of the Minnesota properties.

In 1906, about the time the Commission entered upon its investigation of rates, it also undertook to ascertain the physical values of railway properties in Minnesota and in doing this endeavored to estimate the cost of reproduction. Upon the trial of these cases statements were introduced upon behalf of the state containing estimates of reproduction cost of these properties. These statements were prepared upon different bases, one containing an estimate of the cost of reproduction new upon the assumptions of increased cost of land, as already described, not including area of streets, and the other in which lands were taken at what was claimed to be their present true or market value and a deduction made for depreciation in items of construction and equipment. In each table there were included by the engineer who made the estimates items for engineering and legal expenses, contingencies and interest during construction. If these items, which we insist are purely fictitious were eliminated this second statement would be an estimate of actual present physical value. It, however contains items upon which the carrier is not entitled to earn a return, namely, lands donated for right-of-way, lands owned but not used for transportation purposes and additions to the property acquired by the expenditure of earnings. Another class of property to be distinguished is land acquired by eminent domain.

We feel that it will be necessary to discuss each of these items and the testimony with reference to each in detail and therefore ask permission at this time to give only a summary of the Master's findings and the claims of the respective parties with reference to the Minnesota properties.

NORTHERN PACIFIC.

Minnesota Property.

Complainants' Claim of Reproduction Cost as given in Exhibit 3, Darling, Vol. 10, N. P. Record...	$101,158,583.13
Master's finding of Reproduction Cost, Vol. 1, pp. 235-6, N. P. Record	90,204,545.00
Physical value as shown by Defendant's Exhibit "OO" Morgan, estimate B, Vol. 9, N. P. Record. Deducting therefrom $8,543,498.20 allowed for engineering, &c. contingencies and interest during construction	45,604,425.80
Interests in Terminals	1,212,984.95
	$46,817,410.75

GREAT NORTHERN.

Minnesota Property.

Complainants' Claim of Reproduction Cost as given in Exhibit 2, Hoagland, Vol. 6, G. N. Record..	$157,348,856.00
Master's finding of Reproduction Cost, Vol. 1, pp. 236-7 N. P. Record	138,425,291.00

Physical value as shown in Col. 10, Defendant's Exhibit C, Morgan, Vol. 5, G. N. Record. Deducting therefrom $18,717,391.74 allowed for engineering, &c. contingencies and interest during construction.	63,892,995.62
Interests in Terminals	502,597.28
Solidification of roadbed	3,219,642.09
	$67,615,234.99

MINNEAPOLIS & ST. LOUIS.

Minnesota Property.

Complainants' Claim of Reproduction Cost as given in Exhibit 28-Cutler, Vol. 6, M. & St. L. Record No. 601	$21,845,196.00
Master's finding of Reproduction Cost, Vol. 1, pp. 237-8, N. P. Record	21,608,464.00
Physical value as shown in Col. 6, Defendants' Exhibit K-Morgan, Vol. 5, M. & St. L. Record. Deducting therefrom $1,796,841.15 allowed for engineering, &c., contingencies and interest during construction	10,042,252.21
Interests in Terminals	502,597.28
Solidification of roadbed	608,896.43
	$11,153,745.92

We feel that we will be able to demonstrate that the evidence thus introduced upon behalf of the state was the only evidence tending to show the present physical value of the properties and that there

was absolutely no evidence upon which a higher value could be found than the amounts thus shown by the state, and while, as already explained, those amounts are each excessive, as a basis upon which to predicate rates, it is nevertheless true that if present physical value of the property is a necessary, or proper, element to consider in arriving at the fair basis upon which to predicate rates, the evidence upon behalf of the state above referred to is the only evidence upon that subject.

This statement is based upon the fact that the witnesses for complainants upon whose testimony the Master based his findings testified only to their estimates of reproduction cost, and expressly stated, over and over again, that the estimates so made were not estimates of actual value, but were estimates of reproduction cost only. Cooper, Vol. 2, p. 198, N. P. Record 599; Darling, Vol. 7, p. 3241, same record; Darling, p. 3243, same record; Darling, p. 3246, same record; Hayden, Vol. 2, p. 282, Great Northern Record No. 600; Hoagland, p. 161, same record; Stevens, page 463, same record; Hill, Vol. 3, p. 1351, same record.

Having thus determined the amount which in his opinion was "the fairest and most equitable basis upon which to predicate rates," upon each railway, the Master proceeded to assign, between the freight and passenger business what he thus described as the value of the property devoted to the service. The factors used by the Master for this purpose were the gross earnings respectively of each class of business. Vol. 1, p. 247, N. P. Record No. 599.

He next divided the values apportioned to freight and passenger business respectively between intrastate and interstate business upon the gross earnings basis; p. 248, same record.

We anticipate no difficulty in showing that the divisions so made were erroneous and assigned, first, an excessive proportion of value to passenger business, and, second, an excessive proportion to intrastate business, both freight and passenger.

It was also necessary to find the cost of intrastate business, both freight and passenger, upon each road separately. Upon behalf of the State it was insisted that this could be shown with approximate accuracy by a proper analysis of the records of the companies and to demonstrate this an expert accountant, Mr. C. W. Hillman, was employed by the state to make the analysis and having done so his conclusions were presented to the Master. The complainants contended that no such mathematical demonstration or analysis was reliable, but that the Master must depend upon the judgment and conclusions of practical railway officials and accept their *opinions* as to the relative cost of the service.

The Master, and in turn the Court, entirely rejected the testimony upon behalf of the state, accepted that upon behalf of the complainants and found that the cost per unit or ton mile of intrastate freight was at least 2½ times that of interstate freight. Vol. 1, p. 258, N. P. Record No. 599, and that the cost per passenger mile intrastate was at least 15% greater than such cost in the interstate passenger business in Minnesota. (Same page.)

The testimony upon this question will be fully discussed at an appropriate place in this brief and we feel confident of being able to show the findings are unsupported by the evidence.

In addition it was found, Vol. 1, p. 252, N. P. Record, No. 599:

> "The Master determines that under the conditions disclosed in these cases the companies are entitled to a net return of 7% upon the value of their property as herein found."

The learned Circuit Judge said, Vol. 1, p. 432, same record:

> "* * * the conclusion is irresistible that a net return of 7% per annum upon the respective values of the properties of these companies in Minnesota devoted to transportation is not more than the fair return to which they are entitled under the Constitution of the United States."

Under the present rules of the Interstate Commerce Commission, operating expenses include allowances for depreciation. Martin, Vol. 3, pp. 972-975, G. N. Record No. 600. Complainants' Exhibit 47-Martin, Vol. 6, same record. So that what is above described as a net return is exclusive of amounts set aside to cover depreciation. It is also exclusive of taxes and is therefore properly referred to as *net* return.

Notwithstanding the excessive "values" adopted by the Master upon which to predicate rates and the improper method adopted by him for assigning to intrastate business its proportion of values and notwithstanding the excessive proportion of operating expenses assigned to intrastate business, it was still

found that the rates in operation, which include all in controversy except the commodity rates provided by Chapter 232, Laws 1907, allowed a net return from intrastate business, to-wit:

	Reproduction cost assigned to intrastate traffic.	Net Return.	Rate of Return.
Northern Pacific	$19,027,619	$553,568.86	2.909%
Master, Vol. 1, p. 264, N. P. Record.			
Great Northern ..	30,685,833	1,030,802.18	3.359%
Master, Vol. 1, p. 270, N. P. Record.			
Minneapolis & St. Louis ..	8,101,012	200,903.18	2.47%
Master, Vol. 1, p. 280, N. P. Record.			

Taking together all of the findings to which we have referred the result on the two principal roads now here would be as follows:

Seven per cent upon $452,666,489, the found reproduction cost of the Northern Pacific, would be $31,686,654.23. The annual interest upon the $190,000,000.00 bonds of that company is $7,000,000.00, leaving $24,686,654.23 applicable to dividends, which would amount to more than 15% upon the par value of the stock notwithstanding the fact, as found by the Master, that the stock represented other properties, the value of which properties, as we have already pointed out, was wilfully withheld.

Upon the Great Northern road, seven per cent upon reproduction cost $457,121,469 would be $31,-

998,502.83. Assuming that the bonds $83,119,939.00 bore interest at 5% the annual interest charge would be $4,155,996.95, leaving $27,842,505.88 available for dividends upon $149,577,500.00 capital stock or more than 18% per annum. The capital stock of this company also represented outside properties, the value of which was not given.

ASSIGNMENTS OF ERROR.

Exceptions were taken by these appellants to the Master's findings, all of which were overruled, the learned Circuit Judge saying, Vol. 1, p. 432 N. P. Record (No. 599):

> "Other exceptions were taken by the defendants, but they must be overruled, because they are not of the controlling character of those that have been discussed. And they are not sustained by the record. For the same reasons, the exceptions of the complainants must share a like fate."

When the applications for the allowance of these appeals were made, errors were assigned in each case and appear in the records as follows:

Vol. 1, p. 444 N. P. Record (Simpson v. Shepard No. 599).

Vol. 1, p. 468 G. N. Record (Simpson v. Kennedy No. 600).

Vol. 1, p. 377 M. & St. L. Record (Simpson v. Shillaber No. 601).

The assignments were similar in each case, for convenience we reallege them here as they appear in Vol. 1, p. 444 N. P. Record No. 599, except that we have as far as possible corrected some manifest verbal errors and inaccuracies appearing in the printed records.

We also give the pages of the printed record in the same case containing the exceptions, to the Master's report, applicable to the subject.

I.

Said Court erred in finding and decreeing—

> "That the acts of the Legislature of the State of Minnesota, approved April 4, 1907, and April 18, 1907, respectively, and each of them and the orders of the Railroad & Warehouse Commission of the State of Minnesota of September 6, 1906, and May 3, 1907, respectively, and each of them recited in the bill of complaint, operates as a burden upon and in interference with a regulation of and an unjust discrimination against commerce between the states conducted and carried on over and upon the lines of railway of the defendant Northern Pacific Railway Company."

The foregoing part of the decree rests upon certain erroneous findings of fact and conclusions of law made by the Master and upheld by the Court, in each and every one of which there is manifest error in the following particulars, to-wit:

a. The Court erred in ignoring the fact that commerce was divided into the two distinct classes of interstate and intrastate, by the commerce clause of the Federal Constitution, whereby the power to regulate the former class was conferred upon Congress, the power to regulate the latter being left in the states.

b. The Court erred in assuming that the respective constitutional powers of the states and the Nation over commerce can be enlarged or contracted by the similarity or dissimilarity of the conditions affecting interstate and intrastate commerce in any group of adjacent states.

c. The Court erred in holding that interstate rates are presumed to be reasonable simply because the schedules were filed by the carrier with the interstate commerce commission, and that the power of the state to regulate its internal commerce can be exercised only to the extent of making intrastate rates harmonize with interstate rates in the same field whether the interstate rates are reasonable in fact or not.

d. The Court erred in holding that there is any legal relation between interstate and intrastate rates except that arising out of the requirement that when rates are fixed on either class by the sovereignty having control thereof such rates must be reasonable in and of themselves without regard to the earnings of the carriers on the other class.

e. The Court erred in holding that conditions affecting interstate and intrastate business were similar and that the rates on the two constitutional classes were relatively fair and equal in the territory comprising Wisconsin, Minnesota, North and South Dakota, before the rates here involved were prescribed, first because such finding is immaterial in determining the governmental power of this state and secondly because such findings are not supported by, but are contrary to the evidence.

f. The Court erred in holding that the provisions of the interstate commerce act forbidding discrimination between localities in interstate commerce is violated when intrastate rates to a given

point differ from interstate rates for practically equal distances to the same point, though the intrastate rates may be fair and reasonable in and of themselves, and the interstate rates may be in fact unfair and unreasonable in and of themselves.

g. The Court erred in disregarding the proof of peculiar conditions in the way of home markets which distinguish the internal commerce of Minnesota from the intrastate commerce of adjacent states.

h. The Court erred in holding the principle upon which the schedules involved were constructed, was erroneous, because such schedules were made on exactly the same principle as the distance and terminal tariffs which had been long maintained by the companies themselves, and for the further reason that the making of schedules is a legislative question, the courts being concerned only with the sufficiency of the revenue produced thereby.

The exceptions to the Master's findings relating to the conclusions covered by the foregoing assignments of error will be found in the printed record in the Northern Pacific case (Simpson v. Shepard) as follows, Vol. 1, p. 320-322, Vol. 1, p. 339-346:

II.

The Court erred in finding and decreeing "That said legislative acts and orders, are, and each of them is, confiscatory and constitute an attempt to deprive the complainant and the said Railway Company of their and its property without due

process of law, and to deny them and it the equal protection of the law, and that each of said acts and orders is violative of the Constitution of the United States, and are, and each of them is, void and of no effect."

The foregoing part of the decree is based upon certain findings of fact and conclusions of law made by the Master, and upheld by the Court, in each of which the Court committed manifest error in the following particulars:

1. The Court erred in finding and decreeing that the value of railroad property employed in the public service is to be determined solely by estimating the cost of reproducing the same.

2. The Court erred in holding and basing its findings of value upon an estimate of the cost of reproduction which left out of consideration the conditions and circumstances under which the rights of the railroad company in the lands used by it were originally acquired, the amount originally expended in acquiring such rights, and in constructing and equipping the road, and the amount since expended by the railroad company out of capital in permanent improvements, and the amount expended for such permanent improvements out of earnings.

3. The Court erred in basing its findings of value on an estimate which excluded entirely the character, and the face and market value of the stocks and bonds of the company.

4. The Court erred in basing its findings of fact as to value on an estimate which entirely ignored the character of the railroad as a public highway, and wholly failed to distinguish between the value of the fee title of the (land and the easement therein owned and used by the) railroad company.

5. The Court erred in basing its findings of value on an estimate of the cost of reproduction founded entirely upon arbitrary assumptions governed by no fixed or uniform rules.

6. The Court erred in basing its findings of value solely upon an estimate of the cost of reproduction which nullifies all the laws against the fictitious capitalization of railroads, capitalizes permanent improvement made out of earnings, and also capitalizes the growth and industrial development of the country by assigning a value to the railroad easement in land, based on present market value of adjacent private property.

7. The Court erred in finding that the value of property devoted to the use of the public can be ascertained by a method based upon the imaginary obliteration and "reproduction" thereof, especially as to rights in land, and in failing to find and hold that the maximum bases upon which a railroad is entitled to a reasonable return over and above the cost of maintenance and operation, is the actual investment made in acquiring its rights in the necessary land, and in constructing and equipping the road, and in making the permanent improvements thereof which were paid for out of capital.

8. The Court erred in finding that the value of a railroad easement in land acquired in the past can be correctly determined by taking the present market value of the fee in adjacent land and increasing it by an arbitrary element called "railroad value" and again in increasing this by a fixed multiple of itself to cover the constructive severance damages. The Court also erred in holding that the value of railroad property can be determined upon the many arbitrary bases embodied in the method upheld by it, such as allowances for imaginary contingencies and legal expenses, and interest on the cost of the road during an arbitrary and imaginary period of reconstruction.

9. The Court erred in not dismissing the complaint because of the total failure of the complainant to furnish any evidence of the original cost of acquiring construction or improving any part of the property, and for the total failure of the complainant (as shown by the Master's ninth finding) to furnish any proof of the face or market value of the stocks and bonds which represent the part of the tot[illegible]vestment devoted to the public service, separate from the other profit producing property owned by the company and acquired by the same capitalization.

Exceptions to Master's findings, Vol. 1, p. 322 and pp. 346-353 inc. N. P. Record (No. 599).

10. The Court erred in apportioning the value of the property used in the state between passenger and freight business on the gross earnings

basis, and apportioning the common cost on the train and engine mileage bases.

11. The Court erred in apportioning the value assigned to the freight and passenger business respectively between interstate and intrastate traffic on the gross earnings basis.

Exceptions, Vol. 1, pp. 323-329 inc. and pp. 355-360 inc. N. P. Record (No. 599.)

12. The Court erred in basing its findings as to the relative cost of handling interstate and intrastate business on the opinions of witnesses produced by respondent without any proof on behalf of respondent of the actual facts out of which the differences in relative costs arise, after it was shown by appellant that such relative costs can be accurately ascertained by proper cost accounting.

13. The Court erred in rejecting the evidence given on behalf of appellants as to the relative cost of doing the inter and intra business as shown by data taken from the books of the railroad company.

Exceptions, Vol. 1, pp. 329-338 inc. and 358-362 inc. N. P. Record (No. 599).

14. The Court erred in not including in the income of the railroad company all net income derived from other property acquired by the same capitalization and held and used by the company for profit.

15. The Court erred in including in the value of the railroad property cost of reproducing the

property of other independent corporations in which the railroad company held stock.

16. The Court erred in finding that the cost of handling intrastate freight business is two and one-half times the cost of handling interstate freight business, and the cost of handling intrastate passenger business is fifteen per cent greater than the cost of handling interstate passenger business, for the reason that such findings are wholly unsupported by, and are contrary to, the evidence.

Exceptions, Vol. 1, pp. 329-338 inc. and pp. 355-357 inc. N. P. Record (No. 599).

17. The Court erred in failing to require respondent to furnish proof of the total quantity of freight carried on through trains and on local trains respectively over the operating divisions of the road wholly or partly within the state, and the haulage cost of the local trains and the through trains separately, and the respective quantities of interstate and intrastate traffic hauled on said local and through trains, for the purpose of furnishing a basis for determining by computation the relative cost of the inter and intra business, and the Court erred in failing to dismiss the action for failure of complainant to furnish such proof.

18. The Court erred in the matter of determining the difference in the cost of handling interstate and intrastate traffic, in failing to limit the extra cost to the transportation expenses, that being the only grand division of the "cost of operation" in which any difference can exist.

19. The Court erred in refusing to dismiss the case for failure of proof by the complainant as to the actual value of the property employed in the service in the state, and the actual value of the portion thereof employed in intrastate business, and for a total want of proof of the cost of handling such intrastate business or any data from which the same could be deduced.

Exceptions, Vol. 1, pp. 329-338 inc. and pp. 355-357 inc. N. P. Record (No. 599).

20. The Court erred in holding that the income from the stock of an express company, owned by and operating over the railroad, should not be added to other income for the purpose of determining the adequacy of such total income.

Exceptions, Vol. 1, pp. 339 and 362 N. P. Record (No. 599).

21. The Court erred in holding that the legal presumption of reasonableness in favor of the rates was overcome by the finding of the Master that they were unreasonable.

22. The Court erred in finding that a railroad is entitled to a return of seven per cent net on the value of the property devoted to the public use.

Exceptions, Vol. 1, p. 357 N. P. Record (No. 599).

23. The Court erred in holding that, after the railroad company had accepted and put the merchandise rates and the passenger rates into effect they can be enjoined at the suit of this complainant as inadequate without any application by the

Railroad Company to the Railroad and Warehouse Commission for increased rates, in violation of the law of the state requiring such application to be made before existing rates can be raised.

24. The Court erred in adjudging that costs should be taxed against these defendants, who were sued herein solely because of their respective official positions and not because of any personal interest, or any act committed or threatened by them as individuals.

25. The Court erred in finding and decreeing that the laws and orders involved are, or that either of them is, void on acount of the penalties provided for the violation thereof.

SYNOPSIS OF ARGUMENT.

We ask permission to first present four propositions which we believe are decisive of these cases, and necessitate the reversal of each decree appealed from.

I.

THE BILL OF COMPLAINT IN THE NORTHERN PACIFIC CASE CONTAINS NO ALLEGATION THAT THE ENFORCEMENT OF THE PRESCRIBED RATES WILL RESULT IN CONFISCATION OR THAT THE RATES ARE INADEQUATE IN THEMSELVES.

II.

THE MERCHANDISE RATES HAVING BEEN VOLUNTARILY ACCEPTED AND ADOPTED, COMPLAINANTS CAN NOT MAINTAIN A SUIT IN EQUITY TO COMPEL THEIR ABANDONMENT. A STOCKHOLDER'S REMEDY, IF ANY, IN SUCH CASE WOULD BE TO COMPEL AN APPLICATION TO THE RAILROAD AND WAREHOUSE COMMISSION FOR PERMISSION TO CHANGE THE RATES.

III.

THE COURT HAVING FOUND AS A BASIS UPON WHICH TO PREDICATE RATES ONLY "REPRODUCTION COST" ARRIVED AT BY IMPROPER METHODS AND ASSUMPTIONS, AND HAVING ENTIRELY DISREGARDED EVERY OTHER ELEMENT GOING TO MAKE UP FAIR VALUE AND HAVING ERRONEOUSLY INCLUDED MANY ITEMS OF PROPERTY UPON WHICH THE CARRIERS ARE NOT ENTITLED TO EARN A RETURN; THERE IS NO SUFFICIENT FINDING OF VALUE UPON WHICH TO COMPUTE THE RETURN, AND THEREFORE NO BASIS FOR THE FINDING OF CONFISCATION.

IV.

AS EVERY STATE UNDER OUR SYSTEM HAS PLENARY AND EXCLUSIVE CONTROL OVER ITS INTERNAL COMMERCE, RATES PRESCRIBED BY A STATE, LIMITED IN THEIR APPLICATION TO SUCH COMMERCE, CANNOT CONFLICT WITH THE FEDERAL COMMERCE POWER. NEITHER CAN UNLAWFUL DISCRIMINATION ARISE OUT OF DIFFERENCES BETWEEN INTERSTATE AND INTRASTATE RATES, AND THIS IS ESPECIALLY TRUE WHERE THE INTRASTATE RATES ARE FAIR AND REASONABLE PER SE, AS STATE MADE RATES ARE PRESUMED TO BE, AND THERE IS NO CLAIM OR SHOWING OF REASONABLENESS AS TO THE INTERSTATE RATES WITH WHICH THE COMPARISON IS SOUGHT TO BE MADE.

Although we believe an examination of the above four claims must result in reversal and for that reason we suggest them in the order named, we will next submit our reasons for claiming that:—

V.

THE COURT IMPROPERLY APPORTIONED BETWEEN PASSENGER AND FREIGHT AND BETWEEN INTERSTATE AND INTRASTATE BUSINESS IN EACH, THE "REPRODUCTION COST" TAKEN, THOUGH IMPROPERLY, AS THE BASIS UPON WHICH TO PREDICATE RATES.

VI.

THE COURT IMPROPERLY APPORTIONED BETWEEN PASSENGER AND FREIGHT BUSINESS, THE COST OF THE SERVICE.

VII.

THE COURT ERRONEOUSLY ASSIGNED AN EXCESSIVE PROPORTION OF TOTAL OPERATING EXPENSES TO INTRASTATE BUSINESS BOTH FREIGHT AND PASSENGER.

VIII.

THE PRESCRIBED RATES ALLOW EARNINGS WHICH ARE ADEQUATE AND COMPENSATORY.

IX.

IN NO EVENT SHOULD COSTS OF SUIT BE ASSESSED AGAINST PUBLIC OFFICERS HAVING NO PERSONAL INTEREST IN THE CASES.

Argument.

I.

THE BILL OF COMPLAINT IN THE NORTHERN PACIFIC CASE DOES NOT ALLEGE CONFISCATION.

In the Northern Pacific Case (No. 599) the bill of complaint, properly construed, contains no allegation that the rates are confiscatory *unless they apply to interstate commerce.*

In Paragraph 13 of the amended and supplemental bill of complaint in that case (page 138, Vol. 1, Record) it is alleged:

> "While the immediate effect of said acts and orders, if that effect could be confined strictly to the State of Minnesota might leave the defendant company a fair revenue upon its whole system, still if the principle upon which the tariffs complained of are made, and which is before described, be applied to the long haul interstate business of said company, and if the percentage of reduction effected by such acts and orders be applied to the local business of said company *in other states* (which is already being transacted upon rates fair and equal by comparison with said company's Minnesota rates in force prior to the promulgation of said acts and orders) it would operate to confiscate the property of said Company and your Orator and to deprive it and him of property without due process of law, in violation of the Constitution of the United States, because such measure of reduction would leave said Company without any net earnings whatever from its property."

The foregoing excerpt qualifies the general allegation as to the confiscatory character of the rates, which precedes it, and fairly construed clearly shows that confiscation was not intended to be charged, unless two other things besides the enforcement of the rates according to their terms happened; both of which were impossible so far as the power of the state was concerned. The State of Minnesota has neither the power nor the desire to apply "the principle upon which the tariffs complained of are made" to any commerce other than that to which by their terms the tariffs now apply, and if not confiscatory as so applied they are not and cannot become confiscatory at all. The testimony of complainants and the specific tariffs from other states read into the record, show that local rates are not the same in any two states, and the "principle of the tariff," in any state, as in the case of the Iowa distance tariff, does not affect any other state.

It is to be noted that a distinction is made in complaining of the "principle" of the tariff, between the long haul *interstate* business and the *intrastate* business of other states. So far as the intrastate business of other states is concerned, the only objection made is to the "percentages of reduction." The correctness of the "principle upon which the tariffs are constructed," as applied to the shorter haul intrastate business of a state is thus admitted. The complaint in this case was evidently framed solely with a view to raising the question of the alleged interference of the tariffs

with the federal commerce power, and if not upheld on that issue there is no further issue in the case.

The language of the foregoing excerpt from the complaint in this suit is practically identical with that of the complaint in the case of O. R. & N. Co. v. Campbell, 173 Fed. 957, now before this court, in which the learned Circuit Court of the district of Oregon held that it did not state a cause of action. On this subject that Court said (p. 991):

> "Are the rates established by the Commission *in Oregon and for Oregon*, and not beyond its confines, reasonable? That they are is practically admitted by the averment quoted, that the effect of the order, if confined to the state, might leave a fair income on complainants' entire business. In other words, the pleader is not willing to negative the fact of reasonableness that attends the order by legal presumption."

The learned Court below did not seem to consider itself bound by the allegations of the complaint, because it not only found the rates confiscatory as to this company, in the absence of a proper allegation in the bill of complaint upon which such a finding could be based, but in doing so it also disregarded the allegation of the complaint as to the value of the property employed in the public service. Paragraph 17 of the complaint (p. 140, same volume of record) claims the property of the entire system to be worth $350,000,000; the Master, whose findings were all expressly approved by the Court found by his method the value of the system to be $452,666,489 (page 246, same volume). If

the Court had considered itself bound by the complaint, and had found that the value of the system was *the whole amount claimed therein*, and had apportioned to Minnesota its share of that value on the proportion of the track mileage in Minnesota,—which would be charging this state with a portion of the excess cost of mountain construction in the west—it would give as the value of the road in Minnesota $73,500,000. The Master found the value in Minnesota to be $90,204,545 or $17,704,545, more than was claimed in the complaint by any fair construction of its language. In the Great Northern case the value claimed in the complaint was $400,000,000 (Par. 8, page 8, Vol. 1, Case No. 600); the value of the system found by the Master's method (page 203, same record and volume), was $457,121,469, and the value found for Minnesota in excess of what a mileage prorate of the whole amount claimed in the complaint would assign to it, was more than $8,000,000. This shows how carelessly these great issues were treated in the court below, and that the cases call for no liberality of construction, in order to keep in court an issue, which seems to us, it cannot be said, the complainant intended to present, and, in support of which, the value alleged in the complaint had to be exceeded.

II.

THE MERCHANDISE RATES WERE ADOPTED WITHOUT COMPULSION AND COULD BE CHANGED ONLY IN THE MANNER PRESCRIBED BY CHAPTER 176, LAWS OF MINNESOTA 1905.

As to this we have made the following assignment of error:

23. The Court erred in holding that, after the railroad company had accepted and put the merchandise rates and the passenger rates into effect they can be enjoined at the suit of this complainant as inadequate, without any application by the Railroad Company to the Railroad and Warehouse Commission for increased rates, in violation of the law of the state requiring such application to be made before existing rates can be raised.

It appears from the record,—and we have heretofore called attention to the fact—that the railroad companies had all adopted and put into effect the rates prescribed by the state upon classified merchandise, the carload in-rates to small distributing towns, and also the two cent passenger rates, and they all remained in effect until July 1st, 1911, when they were peremptorily abrogated by the final decrees in these cases. When the rates referred to were voluntarily accepted and put in by the carriers, they became the exclusive rates upon the subjects covered by the tariffs, as completely as if they had been formulated by the carriers themselves, and were clearly subject to the law above

referred to. In order to make any change in them it was necessary for the carriers to apply to the Commission for leave to do so. After the rates had been in a reasonable length of time, so that their effect could be demonstrated, it would have been an entirely orderly and appropriate procedure to ask the Commission for leave to raise them, if they were too low. If a stockholder desired to cause this to be done, he could have compelled the company by mandamus to take the step required by the law. These suits were brought and injunctive decrees applied for in utter disregard of the law referred to.

The statute is a perfectly valid, reasonable and necessary regulation, *and was an absolute bar to these suits as to the rates that were in, until relief by the Commission should be refused.* The primary purpose of the enactment of the law was to prevent arbitrary changes in rates by the so-called "midnight" method. The same power has been lodged by congress with the Interstate Commerce Commission, and it is clear that without the exercise of such a power by some tribunal, there can be no well balanced efficient public regulation.

We are not informed by the Court why it ignored this law, and, without requiring the carriers to first seek relief under it, peremptorily forbade further obedience to the state tariffs. The decree is not saved by the fact that it did not direct a return to the old schedules; it held these tariffs to be too low, and forbade further observance of them, from which the adoption of higher schedules by the com-

panies and a violation of the law referred to, necessarily followed.

The Court did not find the law to be unreasonable. It refused to even consider it, although it was repeatedly called to the Court's attention; Vol. 6, p. 2620 N. P. Record, No. 599, and its existence is recited by the Master as a fact. Vol. 1, p. 187, same record.

A court of the state could have enjoined the companies from raising rates without application to the Commission, and if a federal court can at the same time *command* them to raise rates *without* application to the Commission, there is but little use for the state to pass laws.

In Prentiss v. Atlantic Coast Line Co., 210 U. S. 226, a case involving substantially the same question this Court said:

> "No rate is irrevocably fixed by a state until the mater is laid before the body having the last word."

When the companies voluntarily put in these rates they abandoned their old tariffs, and *eo instanti* such old tariffs went completely out of existence. From that time forward there were no other legal rates than these, for the subjects to which they applied. If new rates were to be substituted they would have to be prepared by the state or by the companies themselves, and if prepared by the companies themselves, they could not under this law be published or adopted without the consent of the Commission. Of course this requirement did not put it absolutely within the

power of the commission to prevent the establishment in a proper case, of reasonable rates, by an arbitrary or unreasonable withholding of their consent. The courts have power to require administrative officers to do their duty. But these suits, commenced without applying to the commission for relief, without asking the "body having the last word" on behalf of the state whether or not relief would be granted, must, it seems to us, be upheld if at all, on the theory that the court, although possessing no rate-making powers, may substitute its consent to a raise in these rates for the consent of the Commission which the law requires. The commission, with no additional information before it than that obtained during its investigation of the subject, could not be expected to offer relief to the companies, if relief was necessary, without being asked. There is not the slightest doubt but that if these rates had been found to be unreasonable after a fair trial, and if under those circumstances and with that showing application had been made to the Commission, they would have consented to higher rates. Neither the railway commission nor any other officer of the state has shown the slightest disposition at any stage of this controversy to be prejudiced or unfair. The state officers are simply performing a public duty and each is guided in so doing by the same conscience and sense of justice and by the obligation of the same official oath as the court. Instead of precipitating an unseemly conflict between the governments by attempting to prevent the installation of higher

rates, we have permitted the companies to openly violate our law and have awaited this our first opportunity to present the question to this court and we now respectfully and earnestly ask a ruling upon it.

LEGAL EFFECT OF COMMISSION'S ORDER.

When on September 6, 1906, the commission rendered its decision as to merchandise rates, the order, in its then condition, was little more than advisory. Each railway as well as any other party to the proceeding had the right to appeal.

§ 1971 Revised Laws 1905.

Under the then existing statutes, even if no appeal were taken, the order after the expiration of thirty days given for appeal, would, in proceedings brought to enforce it, have been only prima facie evidence that the prescribed rates were reasonable.

State v. M. & St. L. Ry., 80 Minn. 191.

The amendment to the statute making the order conclusive, unless appealed from, Ch. 167, Laws 1907, was approved April 12, 1907, long after the rates were published.

Under these conditions, adoption by the companies of the merchandise rates, had exactly the same legal effect as though they had been adopted upon the initiative of the carriers themselves.

Complainants and the carriers had each an adequate remedy at law, and, no cause of action in equity appears here as to the merchandise rates,

nor are any of the complainants entitled to equitable relief as to them.

It is submitted that for these reasons alone each of the decrees here appealed from must be reversed.

III.

VALUATION OF PROPERTY AND BASIS FOR COMPUTATION OF RETURN.

The findings upon this question comprise the sixth subdivision of the Master's report (Vol. 1, p. 217 N. P. Record). The errors assigned are contained in the second specification, subheads 2 to 9 inclusive. Our position is that—

THE COURT HAVING FOUND, AS A BASIS UPON WHICH TO PREDICATE RATES, ONLY "REPRODUCTION COST," ARRIVED AT BY IMPROPER METHODS AND ASSUMPTIONS, AND HAVING ENTIRELY DISREGARDED EVERY OTHER ELEMENT GOING TO MAKE UP FAIR VALUE, AND, HAVING ERRONEOUSLY INCLUDED MANY ITEMS OF PROPERTY UPON WHICH THE CARRIERS ARE NOT ENTITLED TO EARN A RETURN; THERE IS NO FINDING OF VALUE UPON WHICH TO COMPUTE THE RETURN, AND THEREFORE NO BASIS FOR THE FINDING OF CONFISCATION.

In determining the aggregate amount upon which to test the sufficiency of the prescribed rates, a return should be computed, the Court,—while apparently conceding it should be no more than the fair value of the property devoted to transportation, as said by this Court in Smyth v. Ames,—held that fair value meant present value which in turn was best determined by ascertaining the cost of reproducing new, all the property used by each company.

Thus after citing Willcox v. Consolidated Gas Co., the Master said (Vol. 1, pg. 219, N. P. Record, No. 599):

> "In the light of this decision, and others therein referred to, and approved, our first duty is to ascertain the fair value of the property devoted to the public service."

Previously he said (Vol. 1, pg. 218, N. P. Record):

> "It also appears from this and subsequent cases that it is the present value of the property which is to be taken as a basis of rates."

The learned Circuit Judge evidently understood the Master to have found the present physical value of the properties devoted by each company to the service in which it was engaged. The decision reads (Vol. 1, pg. 415, N. P. Record):

> "In the ascertainment of the necessary facts, and in the determination of this issue, the Master pursued this approved method in the case of each company. Take the Northern Pacific Company, for example. He first found the real value of that portion of its Minnesota property devoted to transportation in Minnesota during the year ending June 30th, 1908, to be $90,204,545. * * *"

Having thus concluded that the basis for rates was the present value of the property devoted to the service, the Master further found such value was fixed by the "cost of reproduction" and thereupon proceeded to find what has been designated in these cases as the "cost of reproduction new."

The Master said (Vol. 1, pg. 218, N. P. Record):

> "This clearly shows that the company is to share as well as the public in the general

> growth and prosperity of the country. It would seem, therefore, that the value of these properties can best be determined by reference to the cost of reproduction at the present time."

Again (Vol. 1, pg. 243, N. P. Record):

> "The Master is thus confirmed in his opinion that the cost of reproduction new is the fairest and most equitable basis upon which to predicate rates, both for the carrier and the public, and he has accordingly adopted it in these cases."

In reviewing and confirming these findings of the Master, the learned Circuit Judge said (Vol. 1, pg. 417, N. P. Record):

> "Evidence of the cost of reproduction of the Minnesota property of each of the companies, of the original cost of acquisition and construction thereof, and of the average market value of the stocks and bonds of each of the companies for a reasonable period of time prior to June 30th, 1908, was introduced before, and considered by the Master."

and, after some further statements (Vol. 1, page 418):

> "In view of these facts the Master rightly decided that the cost of reproducing this property new was a more rational and reliable measure of its real value than the original cost of its acquisition and construction, or the market values of the stocks and bonds of the companies, and upon that basis made his findings."

This was the ultimate conclusion; for, although the Master made, in a somewhat perfunctory manner, findings of original cost, capitalization and market value of stocks and bonds, he finally reject-

ed each of these elements in considering value, and, to use language of the decision, "decided that the cost of reproducing this property new was a more rational and reliable measure of its real value."

Fair Value as a Basis for Rates.

The term "fair value" must be understood in the connection in which it is used and the purpose, in each case, for which a valuation of property or property rights is made.

The ascertainment of property values in the case of a sale or the taking over of a business is one thing, while a valuation as a basis upon which to compute a proper return for public services, is altogether different. The distinction extends not only to the value to be placed upon a given item, but, to what is far more important, the class of items to be included in finding the total value.

There is a numerous class of property, property rights and elements of value held by every public service corporation which it has, in one way or another, received as a free grant from the public and which, in a sale or condemnation of the entire business or plant, must be given consideration, but inasmuch as these were free grants to the corporation for the purpose of making its private investment secure and reasonably remunerative, when the question is one between the corporation and the public as to reasonable rates and charges, these items must be excluded and the basis upon

which to predicate rates limited to the investment of the corporation.

City of Knoxville v. Knoxville Water Co., 212 U. S. 1.

Willcox v. Consolidated Gas Co., ib. 17.

Railroad Commission v. Cumberland Tel. &c Co. ib. 414.

City of Omaha v. Omaha Water Co., 218 U. S. 180.

CHARACTER OF RAILROADS AND RAILROAD PROPERTY.

The status of railroad companies and that of their properties was clearly defined by this Court in the opinion written by the late Mr. Justice Brewer in Budd v. New York, 143 U. S. 517. It was said (p. 549):

> "Property is devoted to a public use when, and only when the use is one which the public in its organized capacity, to-wit, the State, has a right to create and maintain, and, therefore, one which all the public have a right to demand and share in. The use is public, because the public may create it, and the individual creating it is *doing thereby and pro tanto the work of the State.* The creation of all highways is a public duty. Railroads are highways. The State may build them. If an individual does that work, he is *pro tanto* doing the work of the State. He devotes his property to a public use. The State doing the work fixes the price for the use. It does not lose the right to fix the price, because an individual voluntarily undertakes to do the work. But this public use is very different from a public interest in the use."

In Smyth v. Ames (169 U. S. 544):

> "A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. *It performs a function of the State.* Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public."

In the case of Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, in drawing the distinction between property devoted to a use in which the public has an interest, and property devoted to public use, it was said (page 93):

> "Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered and in those in which, without any intent of public service the owners have placed their property in such a position that the public has an interest in its use. Obviously there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that willingly or unwillingly the public has acquired an interest in its use. In the one he deliberately undertakes to do *that which is a proper work for the State.* * * * *If in such a case an individual is willing to undertake the work of the State*, may it not be urged that he in a measure subjects himself to the same rules of action, and that if the body which expresses the judgment of the state believes that the particular services should be rendered without profit he is not at liberty to complain? While we have said again and again that one volunteering to do such services cannot be compelled

to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the State may do the work without profit, if he voluntarily undertakes *to act for the state* he must submit to a like determination as to the paramount interests of the public? Again, wherever a purely public use is contemplated the state may and generally does bestow upon the party intending such use some of its *governmental powers*. It grants the right of eminent domain by which property can be taken and taken not at the price fixed by the owner, but at the market value. It thus enables him to exercise the powers of the state, and exercising those powers and doing the work of the state is it wholly unfair to rule that he must submit to the same conditions which the state may place upon its own exercise of the same powers and the doing of the same work?"

While technically and for some limited purposes railroads may be described as private corporations, their relations to the public are different from the ordinary private corporation as well as from those which, without any intent of public service, "have placed their property in such a position that the public has an interest in its use" for, as stated in the foregoing opinion, a railroad is performing a function of the state and in so doing is exercising governmental powers.

At the inception of the enterprise the railroad company asks for a grant of governmental power and in exchange voluntarily undertakes to perform

a governmental function and to serve the public diligently, adequately, fairly and equally.

The contract upon the part of the state is expressed in Section 4 of Article 10 of the Constitution of Minnesota:

> "Lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use. In all cases, however, a fair and equitable compensation shall be paid for such land, and the damages arising from the taking of the same; but all corporations being common carriers, enjoying the right of way in pursuance of the provisions of this section, shall be bound to carry the mineral, agricultural and other productions of manufacturers on equal and reasonable terms."

Obviously the first test of a reasonable charge for the service is the direct cost to the carrier and, inasmuch, as the service requires the use of private property owned by the corporation, the cost may be said to include compensation for such use or a reasonable return upon the property devoted to the service, if such return can be secured without the imposition of exorbitant charges.

IN NO CASE SHOULD THE RETURN BE COMPUTED UPON A SUM GREATER THAN THE ORIGINAL INVESTMENT.

It is impossible to state our position in this regard more clearly and concisely than by using the language of Commissioner Lane, who, in writing the unanimous decision of the Interstate Commerce Commission, In re Investigation of Advances

in Rates by Carriers in Western Trunk Line, etc., decided February 22, 1911, (20 I. C. C. Rep. 347) said:

> "* * * Perhaps the nearest approximation to the fair standard is that of bona fide investment—The sacrifice made by the owners of the property—considering as part of the investment any shortage of return that there may be in the early years of the enterprise. Upon this, taking the life history of the road through a number of years, its promoters are entitled to a reasonable return. This, however, manifestly is limited; for a return should not be given upon wastefulness, mismanagement or poor judgment, and always there is present the restriction that no more than a reasonable rate shall be charged."

The railroad company is not compelled to construct its road; it voluntarily assumes the task, and its undertaking is not entirely immune from the chance of loss. If the road is improperly located; if competition or changed conditions rob it of the business it expected to get, or if through calamity or other cause the population and business in its territory suffers depletion, it cannot for that reason make its rates so high as to produce a reasonable income on the original investment, regardless of the rights of the public. It is also true that if its capital was improperly used and was not put into the property, the public cannot be made to suffer therefor by the payment of unjust rates.

This question came before this Court in Covington & Lexington Turnpike Co. v. Sandford, 164 U. S. 578, involving the rates for the use of a turnpike, the business of which had become demoralized

by railroad competition. It was held that the consequence of such conditions could not be visited on the public. The Court said (p. 596):

> "It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation operating the roads, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not righfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the service rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

The same principle was announced in the Circuit Court in Missouri, K. & T. R. R. Co. v. Interstate Commerce Commission, 164 Fed. 645, where the Court said:

> "To be just and reasonable, within the meaning of the constitutional guaranty, the rates must be prescribed with reasonable regard for the cost to the carrier of the service rendered and for the value of the property employed therein; but this does not mean that regard is to be had only for the interests of the carrier, or that the rates must necessarily be such as to render its business profitable, for reasonable regard must also be had for the value of the service to the public. And where the cost to the carrier is not kept within reasonable limits, or where for any reason its business cannot reasonably be so conducted as to render it profitable, the misfortune must fall upon the carrier, as would be the case if it were engaged in any other line of business."

In Smyth v. Ames, where the claim was made that a railroad company was entitled to an income on its capitalization without regard to the actual investment, it was said (page 544):

> "It cannot, therefore be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.
>
> If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon

such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged. What was said in Covington & Lexington Turnpike Road Co. v. Sandford, 164 U. S. 578, 596-7, is pertinent to the question under consideration." * * *

"'It cannot be assumed that any railroad corporation accepting franchises, rights and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it the power to construct and maintain a public highway simply for its benefit without regard to the rights of the public. But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property."

* * * * *

"The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property, as will be just both to it and the public.'

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the

> property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the Company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

By these most righteous decisions this court disposed of, for all time, the claim that private incorporators could establish by their own declarations or manipulations an excessive basis for charges to the public, for a public service voluntarily entered upon. Next we have those cases in which this court has been called upon to examine, the methods and bases adopted for arriving at the real value of the property devoted to the public use.

These should be read in the light of the repeated declaration of this court that each case must be determined for itself, in view of the particular facts and circumstances under which it arose.

This salutary rule, necessary to the wise and judicious exercise of the great powers of this court, is so well established and has been so repeatedly asserted, that we cannot understand how the eminent counsel for complainants attach so much importance to particular words or sentences found in the decisions, without, apparently, considering the special facts as to which they were used.

In San Diego Land & Town Co. v. National City, 174 U. S. 739, involving the reasonableness of water rates in an irrigation district in California, we find the basis for income defined as "The reasonable value of the property, at the time it is being used for the public." That was a case where it appeared that the original cost exceeded the present value. The Court said:

> "The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money, it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant, is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the Company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed, and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case

control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public.

One of the points in dispute involves the question whether the losses to the appellant arising from the distribution of water to consumers outside of the city are to be considered in fixing the rates for consumers within the city. In our judgment the circuit court properly held that the defendant city was not required to adjust rates for water furnished to it and to its inhabitants so as to compensate the plaintiff for any such losses. This is so clear that we deem it unnecessary to do more than to state the conclusion reached by us on this point."

In M. & St. L. Ry. Co. v. Minn., 186 U. S. 257, the Court said:

"Each case must be determined by its own considerations, and while the rule stated in Smyth v. Ames is undoubtedly sound as a general proposition, that the railways are entitled to a fair return upon the capital invested, it might not justify them in charging an exorbitant mileage in order to pay operating expenses, if the conditions of the country did not permit it."

In San Diego Land and Town Co. v. Jasper, 189 U S. 439, another California water case, (the same plaintiff as in the National City case, supra), it appeared as before, that the cost exceeded the present value, the Court again held that in such case the present value controlled. The Court said:

"It no longer is open to dispute that under the Constitution 'what the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being

used for the public.' San Diego Land & Town Co. v. National City, 174 U. S. 739-757. That is decided, and is decided as against the contention that you are to take the actual cost of the plant, annual depreciation, etc., and to allow a fair profit on that footing over and above expenses. We see no reason to doubt that the California statute means the same thing. Yet the only evidence in favor of a higher value in the present case is the original cost of the work, seemingly inflated by improper charges to that account and by injudicious expenditures (being the cost to another company which sold out on foreclosure to the appellant), coupled with a recurrence to testimony as to the rapid depreciation of the pipes. In this way the appellant makes the value over a million dollars. No doubt, cost may be considered, and will have more or less importance according to circumstances. In the present case it is evident, for reasons, some of which will appear in a moment, that it has very little importance indeed."

It also appeared that the property of the company operating the plant had been acquired in foreclosure proceedings at a price very much below the original cost. The original cost not only exceeded the price paid at the mortgage sale, but the present value of the property. As to the probative force of the mortgage sale price the Court said:

"The property of the company and its predecessor consisted, not only of the water works, but of a large amount of land. On the evidence the water works may be estimated at about a quarter of the total value. The earlier company was unable to raise the money it needed. Its bonds for $500,000, secured by mortgage, were not worth more than 95, and an attempt to raise a further loan on mortgage failed. The whole amount that the market and

interested stockholders were willing to lend on all the security it could offer was $650,500. The company was put into the hands of a receiver, who issued some certificates, which, we infer, were made a paramount lien. Then, by arrangement with the stockholders who were willing to go on, the mortgage was foreclosed and all the property was sold to those stockholders for the nominal sum of $889,163.33, which was equal to the amount of outstanding certificates and bonds, and was paid by turning them in. This was in 1897, a few months before the passage of the ordinance complained of. The purchasers organized the present corporation, and the above mentioned sum is the cost of the land and water works to it. The appellant protests that this is not a fair value for the property of the company. We doubt whether it is not a liberal allowance. The officers of the two companies at the time thought that they got more than they could have got in any other way. But at all events, it is decided that the price (so paid), is evidence, we might say more important evidence than the original cost."

In the Knoxville case (212 U. S. 1) the capital stock and debenture certificates amounted to $1,175,000, while the physical value found by the Master was only $608,427.95.

Master's Report, Vol. 1, pp. 170-175. Printed record in that case (Oct., 1908, Term, No. 17).

In addition the company was under other heavy indebtedness, so that the return allowed by this court would not, after payment of interest, amount to much more than three per cent upon the par value of the stock.

In the Willcox case (212 U. S. 17) the stock and debenture certificates, convertible into stock, amounted to $99,857,000 (Master's Report, Vol. 1, p. 154, printed record), while the value placed upon the property by the Circuit Court and held excessive by this court, was only $59,000,000 (157 Fed., p. 879), so that again the return was little more than three per cent upon the outstanding stock.

We shall hereafter have occasion to show how far, in determining the basis for valuation, the Circuit Court here departed from the rules established by the Knoxville and Willcox cases, we now only desire to emphasize the fact that when this court in each of the above instances referred to present value it was solely with reference to the facts in the case then being considered, each being one in which for the purpose of finding the proper basis the physical properties, were, with some minor exceptions, stripped to the bone.

Turning now to the Omaha Water Company case (218 U. S. 180) we find a much more liberal valuation approved; because, in that case, the City of Omaha was taking over the entire plant and business. In approving the elements of value there included the Knoxville and Willcox cases were, because rate cases, held not to be in point.

It seems entirely reasonable to say, when an entire business concern is being transferred, that the value of all its rights, privileges and franchises should be included. They are undoubted elements

of value and each contributes in making the investment available and remunerative, but as the remuneration must always be reasonable, to determine what is reasonable, the basis for computing the return cannot be the opportunities of the corporation nor the necessities of the public. Logically and of necessity it must be computed upon the amount contributed by the corporation, or, as said by the Interstate Commerce Commission—"The sacrifice made by the owners of the property."

The only possible question, in this connection, open to discussion, is whether the investment is to be taken at its original amount, increased as suggested by the Commission, or at the real value, (not reproduction cost) at the time of the inquiry of the property invested in, thus in the Willcox case it was said, p. 54:

> "And we concur with the Court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily presented."

While, because of the illogical and extremely excessive basis adopted in the cases, it is perhaps not necessary to a decision that any absolute standard be now announced, we feel justified in pressing upon the attention of the court, the great need of a fixed rule, to govern at least in ordinary cases. We have here an excellent example of the results which follow an attempt to establish values by opinion evidence and the confusion which results when a single individual, acting as Master, is at liberty to indulge in his personal views to the extent shown in these cases.

A question so vital should not be left to be arbitrarily decided in the first instance by a Master in each case as it arises. Mr. Justice Brewer in the Coting case, speaking for the court said:

> "It has been wisely and aptly said that this is a government of laws and not of men; that there is no arbitrary power located in any individual or body of individuals; but that all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them."

In the absence of a rule on this subject, there will be constant conflicts between the Courts, and legislative tribunals clothed with authority to regulate rates, as legislators and judicial officers and the opinion of men differ as to the amount of "increase" to be allowed and the amount which should be disallowed in any given case.

The question whether, for rate-making purposes, any increase in value can be taken to justify an allowance of more than cost, is presented here

upon a record which fully discloses how disastrous will be the result if railway companies are to be allowed a return upon the present value, established by opinion evidence, of all the property used in the service without regard to cost or the manner of its acquisition. How much more intolerable the condition would be, should present value be determined by "cost of reproduction," as applied here, will be shown hereafter.

Reasons for Showing Value of Physical Properties.

We are not attempting to claim that the problem of finding the fair value upon which the return is to be computed is without difficulty. It was to avoid the danger of accepting over-capitalization that this Court insisted in looking through the paper to the real value. Even when present real value of all the property is established there are many conditions remaining to be taken into consideration for the purpose of determining the property which the carrier has contributed.

Original cost of construction alone might not show the actual investment; this clearly appears from Complainants' Exhibit 15-Gray, Vol. X, N. P. Record, which was the first statement of original cost in that case, and claimed $369,252,755.73, but was reduced by the Master to $312,243,555. This still included $91,150,127.54 for railways procured by some exchange or sale of securities after

construction, and to that extent the par value of the securities was erroneously taken as cost. We will hereafter give other instances of improper book values so that, if for no other reason, the physical properties should be inventoried and valued, as a check upon construction cost. When this is properly done and the history of the acquisition of each item used is given a court has before it each element, can determine what, if any, increase in value belongs to the carrier and what portion should not be considered its private contribution to the service.

The alleged confiscation includes the claim that the *State* is taking the *private property* of the railroad companies for *public use*, without compensation, contrary to the terms of the fourteenth amendment. It is important therefore at the outset to determine to what extent property employed in railroading is private, and to what extent it is public, and already devoted to a public use.

The Inventory Should Include Only Property Contributed by the Carrier.

"Property devoted to the service" means, we submit, property which the carrier has thus devoted and which before being so used constituted private means in the purses, or, under the control of those promoting or assisting in the enterprise.

In Munn v. Illinois, 94 U. S. 126, it was said:

> "* * * When *private* property is affected with a public interest, it ceases to be *juris privati*."

Again:

> "* * * When, therefore, one devotes *his* property to a use in which the public has an interest." * * *

In Minneapolis and St. Louis R. R. Co. v. Minnesota, 186 U. S. 268:

> "* * * and while the rule stated in Smyth v. Ames is undoubtedly sound as a general proposition that the railways are entitled to a fair return upon the *capital invested*, it might not justify, etc. * * *"

This must be the proper interpretation of the language so often used by this Court and which we submit no one misunderstood until in response to a general demand for the physical valuation of railway properties, it became expedient for railway companies to devise a method for giving a seeming physical value which would exceed not only the face value of stocks and bonds but so-called commercial value as well as actual present value.

When, therefore, a public service corporation claims, as in these cases, that the present value of its property is vastly greater than the original amount of its investment, or the aggregate amount of its stocks and bonds, and, that its compensation for the use of its property must be based upon the increased value, it at once becomes apparent that the original investment must be compared with the property secured by the direct expenditure of private funds without the exercise of any governmental power, and any amount allowed over the investment must at least be confined to the amount of the increase in value of the property so secured.

For this purpose the lands of these companies must be divided into four classes.

(a) Donated right-of-way.

(b) Land secured by Eminent Domain.

(c) Land purchased for prospective use.

(d) Land secured by private purchase.

The remaining property, entitled "Construction" in this brief, must be divided into two classes.

(e) That procured or produced by the expenditure of private means.

(f) That procured or produced by the use of earnings.

Thus segregated,—and we will show the corporation would have no difficulty in making the segregation,—it could be seen at a glance how much the *private* property of the corporation had increased in value during its use by the public, and we would have fairly presented the question as to the basis to be used for a computation of a fair return.

All These Considerations Were Ignored.

Through the efforts of these appellants, evidence was secured which gave the Master an excellent opportunity of thus analyzing, to a considerable extent, the property used in the service by each company; but every such distinction was ignored and what is designated as the "reproduction cost" of all property controlled by the companies, and,

either used, or, held for a prospective use, in the service was taken as a fair and equitable basis upon which to compute return. Upon that basis the sufficiency of the rates was tested, although the Court said (Vol. 1, p. 421, N. P. Record, No. 599):

> "The Master in effect found that the cost of reproduction and the present value of all the lands for the terminals in the three great cities, including therein all cost of acquisition, consequential damages, and value for railroad use which he allowed, was only about 30 per cent more than the normal value of the lands in sales between private parties."

Under this finding, without regard to the distinction which should have been made in the lands themselves, it is apparent that in finding "reproduction cost" the Master did not find the present real or market value of the lands.

If the Master was right when he said (Vol. 1, p. 218, N. P. Record, No. 599):

> "This clearly shows that the company is to share as well as the public in the general growth and prosperity of the country."

He was wrong, when, instead of fixing the value of the lands at a *normal sum*, he placed upon them an *abnormal* value to the extent of 30 per cent in the case of terminals, and 125 per cent in lands for right-of-way.

Instead of considering and properly classifying each item of property and element of value and determining which should properly be included in the valuation, the Circuit Court approved the formula for finding "reproduction cost" of all

classes of property as already explained, placing an imaginary and excessive value upon each unit and, including as property, privileges and facilities freely granted by the public.

The reproduction cost thus assumed made no allowance for depreciation and included values accruing from the use of earnings and in these respects ignored the decisions of this Court in the Knoxville and Cumberland Telephone cases, *rendered while the testimony here was being taken.*

PHYSICAL VALUES CLAIMED BY THE STATE.

It is not our purpose to enter into a minute analysis of the testimony produced upon behalf of the state.

While this Court said in the Knoxville case that it reserved to itself, in litigation of this character, complete freedom in dealing with the facts of each case, we do not consider it necessary, except for illustration, to ask for an examination of unit prices and kindred details. Our aim is to point out that the showing and method adopted for the purpose of determining a basis upon which to predicate rates was fundamentally wrong, *as a matter of law,* and that no finding based upon the method can be accepted. Further than this, we insist there is a total failure of evidence upon the part of complainants upon which any correct findings could be made.

There was testimony, upon the part of the state, tending to show the physical values of all the prop-

erties, but this was rejected by the Master and Court, so that the findings, upon which the conclusion of confiscation is based, are unsupported by any evidence of the real physical value of the properties.

To establish this we call attention to the testimony of Mr. D. C. Morgan upon behalf of the state, beginning at Vol. 4, p. 1762, N. P. Record (No. 599).

As already stated, Mr. Morgan presented tables giving his estimate of "cost of reproduction new," including multiples on lands, "cost of reproduction new" without those multiples and finally his estimate of present physical value allowing for depreciation. Those final estimates of Mr. Morgan which are the only ones necessary to consider, appear in the respective records as follows:

Northern Pacific, Defendant's Ex. OO-Morgan, Estimate B, Vol. 9, N. P. Record.

St. Paul Union Depot, Defendant's Ex. TT-Morgan, same volume.

Duluth Union Depot, Defendant's Ex. UU-Morgan, same volume.

Minnesota Transfer, VV-Morgan, same volume.

(The three last named are the joint terminal properties constituting the last item in the Master's summary.)

Great Northern, Defendant's Exhibit C-Morgan, columns 9 and 10, Vol. 5, G. N. Record.

Minneapolis and St. Louis, Exhibit K-Morgan, columns 5 and 6, Vol. 5, M. & St. L. Record.

While these tables were presented by Mr. Morgan as containing his estimate of present physical value, they do not show our claim as to the proper basis for rates for the following reasons:

Each contains property, both lands and construction, upon which the carrier is not entitled to a return, and each contains allowances for engineering, contingencies and interest which, we insist, are fictitious. The elimination of those items, a comparatively simple task, would result in a statement of present physical value, of property contributed by the carrier, but, when the testimony for the state was rejected there remained in the record no evidence from which that amount could be ascertained.

We cannot better explain the difference in the character of the testimony given upon behalf of the respective parties than by briefly quoting from the witnesses.

Morgan, for the State, Vol. 5, p. 1833, N. P. Record (No. 599):

> "Q. Calling your attention to Exhibit OO, will you please explain what the first column of figures represents?
>
> A. The first column of figures in Ex. OO represents the cost of reproducing new the properties of the Northern Pacific Railway Company in the State of Minnesota, in which, under item I, the multiples on lands for right-of-way, yards and terminals have been omitted, and the figures inserted are those representing the true value of lands as determined from the investigations made by the sales-method and by transfers of property.
>
> Q. What is the second column?
>
> A. The second column represents the present value of the physical properties of the

Northern Pacific Railway Company in the State of Minnesota, or is different from the first column in that the second column takes into account the depreciation which has taken place through wear and tear of the physical elements. There are some items connected with that that show no depreciation; for example, Item I, land for right-of-way, yards and terminals, would have the same present value as cost of reproduction. The same would be true for Item II, grading, clearing and grubbing; the same would be true for Item VI, ballast, and for item 29, adaptation and solidification of roadbed; for item 30, engineering superintendence and legal expenses; for item 36, freight on construction material; for item 37, contingencies; for item 38, stores and supplies in Minnesota; and for interest during construction."

Let us now turn to the testimony of the witnesses for complainants. In doing so it should be noted that only one basis was presented, namely, "cost of reproduction."

Mr. Cooper, Land Commissioner, Northern Pacific, Vol. 7, p. 3111, N. P. Record:

"Q. So that in no instance have you given the market value of the property upon the basis of the market value of general property surrounding it or the market value of that property purchased by one who was not acting on behalf of a railroad company?

A. That is right."

And again, p. 3118:

"Q. And you are unable to state how much, upon the average, you have added to the true or normal market value, to allow for the additional amount which the Railroad Company would have to pay upon the hypothesis that it is now compelled to purchase the land?

A. That is correct."

Mr. Hayden, Land Commissioner of Great Northern, Vol. 2, p. 204-5, G. N. Record, No. 600:

"Q. You are offering these exhibits, then, and claiming that in your opinion this is the true method for getting at the present value of the Great Northern Railway System, are you?

A. No, my exhibits are presented as in my judgment the cost of reproducing the lands as they exist today, as of date of June 30, 1908."

With reference to the testimony of this witness, the Master said, Vol. 2, p. 194, same record:

"I know, General, but you have got all the facts as to how that was made up and on what theory it was made up, and if it is the wrong theory *they have got no testimony in the case on that point.*"

Mr. Darling, Chief Engineer, Northern Pacific, Vol. 7, p. 3241-2 N. P. Record No. 599:

"Q. Nor have you attempted to make any statement as to the present actual value of the system?

A. No, sir."

Again, p. 3243, same record:

"A. I have made no estimate on the value, Mr. O'Brien."

Mr. Hogeland, Chief Engineer, Great Northern, Vol. 2, p. 161-2 G. N. Record (No. 600):

"Q. We want to examine you again, Mr. Hogeland, when we get this information that we have asked for, and I just want to ask you in a general way whether this estimate that you have now placed before us of the cost of reproducing this road actually represents either the cost of the road or its present value.

A. No, sir, not necessarily, either."

Mr. Stevens, Civil Engineer, called by complainant, speaking of the reproduction method, said, (Vol. 2, p. 463, G. N. Record (No. 600):

"I think it is perfectly worthless. * * *"

Mr. Hill, Chairman Board of Directors, Great Northern, when being cross-examined as to the propriety of adding multiples upon lands, said, (Vol. 3, p. 1351, G. N. Record):

"Well, I don't want to testify absolutely on that question."

Mr. Taylor, real estate expert for complainants, Vol. 4, p. 1431, N. P. Record (No. 599):

"Q. Of course, in the last analysis, the market value of property is made up from a consideration of what the property will sell for upon the market?

A. Well, not quite, as applied to railroad terminals; my criterion of value is what it would cost to duplicate the property."

Mr. Read, real estate expert for complainants, speaking of the appraisement of lands, said, Vol. 4, p. 1143, N. P. Record (No. 599):

"Q. And you put it at a higher price than the ordinary market value of land sold in isolated tracts?

A. We did, yes."

We now present for comparison in the following tables the Master's findings as to cost of reproduction and Morgan's estimates of reproduction new and present value, omitting multiples on land, and, in each case we have added a fourth column, showing present physical values based on Morgan's testimony, but omitting the fictitious items of en-

gineering, contingencies and interest, each of which were added upon the theory of replacement. We have already explained why the aggregate of the items comprising this fourth column is not a proper basis for rates. It is submitted as a proper statement of present value of *all property used and held for future use by the carriers.* As to column one, the Master's findings, he foreshadowed the foundation of each when, during Mr. Hayden's testimony, he used the language we have quoted:

> "* * * If it is the wrong theory, they have got no testimony in the case on that point."

TABLE SHOWING:

Col. 1. Master's finding "Cost of Reproduction New."
" 2. Morgan's estimate reproduction new, omitting multiples on lands.
" 3. Morgan's estimate present value, omitting multiples on lands and allowing for depreciation.
" 4. Appellants' claim of present physical value, omitting all multiples and fictitious items.

Note: Column 4 contains many items, upon which, as appellants claim, the carrier is not entitled to earn a return. These items are specified later in this brief.

NORTHERN PACIFIC.

No.	Subject.	Master, Vol. 1, p. 235, N. P. Record.	Morgan's Ex. OO, Vol. 9, N. P. Record. Reproduction New.	Present Value.	Actual Present Value.
1	Lands, right-of-way, yards and terminals.	$21,024,562	$9,498,099.27	$9,498,099.27	$9,498,099.27
2	Grading, clearing and grubbing.....	*12,331,541	7,695,858.70	7,695,858.70	7,695,858.70
3	Protection work, rip-rap, retaining walls.	374,091	486,530.25	486,530.25	486,530.25
4	Tunnels	253,250	253,250.00	215,262.50	215,262.50
5	Cross-ties and switch ties	3,657,576	2,617,227.48	1,424,725.95	1,424,725.95
6	Ballast	1,960,969	1,266,932.79	1,266,932.79	1,266,932.79
7	Rails	5,645,307	4,728,531.72	3,552,777.93	3,552,777.93
8	Track fastenings	727,228	631,213.36	473,183.14	473,183.14
9	Switches, frogs and railroad crossings...	303,717	259,590.36	176,889.59	176,889.59

PAGE BOUND VE

10	Track laying and surfacing	1,600,591	792,636.00	792,636.00	792,636.00
11	Bridges, trestles and culverts	3,586,063	2,578,014.79	1,811,169.31	1,811,169.31
12	Track and bridge tools	28,073	27,796.49	20,847.39	20,847.39
13	Fences, cattle guards and signs	471,609	422,104.71	211,052.36	211,052.36
14	Stockyards and appurtenances	37,098	19,711.63	12,762.24	12,762.24
15	Water stations	436,489	218,861.17	144,283.35	144,283.35
16	Coal stations	120,039	110,749.00	72,287.28	72,287.28
17	Stations, buildings and fixtures	920,423	493,578.39	301,595.85	301,595.85
18	Miscellaneous buildings	1,054,874	1,234,433.54	920,265.73	920,265.73
19	Steam & electric power plants, gas plants.	196,338	168,562.69	139,816.74	139,816.74
20	General repair shops	1,162,934	1,183,201.00	783,419.05	783,419.05
21	Shop machinery and tools	529,322	450,185.94	363,868.67	363,868.67
22	Engine houses, turn-tables, cinder pits	1,026,346	591,692.72	376,628.61	376,628.61
23	Track scales	38,520	33,889.00	24,732.00	24,732.00
24	Docks and wharves	768,306	781,518.23	635,839.24	635,839.24
25	Interlocking plants and				
26	other signal apparatus	114,430	60,348.00	37,658.32	37,658.32
27	Telegraph lines and appurtenances		41,650.00	29,155.00	29,155.00
28	Telephone lines and appurtenances	285,145	261,004.82	195,753.65	195,753.65
28½	General office furniture	73,654	3,044.20	2,283.19	2,283.19
29	Solidification of roadbed	.....	1,613,612.76	1,613,612.76	1,613,612.76

30	Engineering, superintendence, legal expenses, 4½% 1 to 28	2,785,036	1,733,572.30	1,733,572.30	.....
31	Locomotives	3,454,040	3,230,790.51	2,498,580.52	2,498,580.52
32	Passenger equipment	1,349,829	1,288,293.18	883,769.12	883,769.12
33	Freight car equipment	7,519,722	7,911,927.92	6,123,832.21	6,123,832.21
34	Miscellaneous equipment	372,477	339,709.40	210,049.84	210,049.84
35	Marine equipment	(None)	(None)	(None)	(None)
36	Freight on construction material	(Absorbed)	348,915.57	348,915.57	348,915.57
37	Contingencies, 5% 1 to 34	3,710,479	2,668,851.89	2,668,851.89	.....
38	Stores and supplies in Minnesota	2,658,976	2,259,351.68	2,259,351.68	2,259,351.68
39	Interest during construction 4%, 2½ yrs., 1 to 36	7,420,957	4,141,074.01	4,141,074.01	.....
40	Interest in terminal properties, St. Paul depot, Duluth depot, Minnesota Transfer	2,204,344	x1,371,192.35	x1,212,984.95	x1,212,984.95
	Totals	$90,204545	$63,817,507.82	$55,360,908.95	$46,817,410.75

* In printed record this item is erroneously given as $1,331,541.
x From Ex. XX-Morgan, Cols. 13 & 14, Vol. 9, N. P. Record.

PAGE BOUND VER

VERTICAL IN BOOK

GREAT NORTHERN.

No.	Subject.	Master, Vol. 1, p. 236, N. P. Record.	Morgan Ex. C, Est. B, Vol. 5, Cols. 9 and 10, G. N. Record. Reproduction New.	Present Value.	Actual Present Value.
1	Lands for right-of-way, yards & terminals.	$25,172,650	$7,493,250.41	$7,493,250.41	$7,493,250.41
2	Grading clearing and grubbing	21,685,802	16,531,191.24	16,531,191.24	16,531,191.24
3	Protection work, rip-rap & retain'g. walls	850,069	522,498.25	522,498.25	522,498.25
4	Tunnels	(None)	(None)	(None)	(None)
5	Cross-ties and switches	5,460,809	4,462,522.80	2,433,636.30	2,433,636.30
6	Ballast	3,861,360	2,870,472.43	2,870,472.43	2,870,472.43
7	Rails	9,053,977	8,644,268.49	6,693,565.02	6,693,565.02
8	Track fastening	2,087,615	1,903,030.49	1,493,344.07	1,493,344.07
9	Switches, frogs and railroad crossings...	300,519	284,364.57	199,146.11	199,146.11
10	Track laying and surfacing.....	2,207,753	1,366,615.25	1,366,615.25	1,366,615.25
11	Bridges, trestles and culverts.....	6,664,729	3,908,810.42	2,836,828.63	2,836,828.63
12	Track and bridge tools	54,450	47,786.90	35,840.22	35,840.22
13	Fences, cattle guards and signs.....	448,864	443,473.20	221,736.69	221,736.69
14	Stock yards and appurtenances.....	81,600	61,542.52	41,045.04	41,045.04
15	Water stations	569,900	393,794.26	291,284.90	291,284.90
16	Coal stations	202,200	203,300.00	151,918.00	151,918.00

17	Station buildings and fixtures.....	1,561,200	1,140,050.16	819,220.04	819,220.04	
18	Miscellaneous buildings	1,446,445	1,311,074.20	1,103,392.93	1,103,392.93	
19	Steam and electric power plants and gas plants	413,752	270,420.55	216,336.44	216,336.44	
20	General repair shops	1,070,765	1,174,436.60	938,128.21	938,128.21	
21	Shop machinery and tools.....	953,531	528,934.89	423,147.91	423,147.91	
22	Engine houses, turn-tables and cinder pits	727,100	634,695.00	446,432.59	446,432.59	
23	Track scales	39,700	27,829.00	17,077.40	17,077.46	
24	Docks and wharves	37,500	38,392.00	34,552.80	34,552.80	
25	Interlocking plants	193,268	122,192.00	91,295.28	91,295.28	
26	Signal apparatus	116,046	63,092.50	61,334.35	61,334.35	
27	Telegraph lines and appurtenances.....	634,744	445,873.82	334,405.36	334,405.36	
28	Telephone lines and appurtenances.....	37,893	3,491.00	2,618.25	2,618.25	
29	Solidification of roadbed.....	(Absorbed)	*3,219,642.09	3,219,642.09	3,219,642.09	
30	Engineering, superintendence, legal expenses, 4½% 1 to 28.....	3,867,040	2,470,383.13	2,470,383.13	.....	
31	Locomotives	5,469,270	4,127,544.12	3,145,881.80	3,145,881.80	
32	Passenger equipment	1,886,178	1,835,089.38	1,326,953.13	1,326,953.15	
33	Freight car equipment	12,411,265	12,949,934.80	9,149,128.94	9,149,128.94	
34	Miscellaneous equipment	482,909	333,805.88	215,605.22	215,605.22	
35	Marine equipment	(None)	(None)	(None)	(None)	
36	Freight on construction material.....	1,700,043	752,547.41	752,547.41	752,547.41	

PAGE BOUND VERTI

37	Contingencies	4,367,826	3,868,335.38	3,868,335.38	.....
38	Stores and supplies in Minnesota	3,240,178	1,632,565.00	1,632,565.00	1,632,565.00
39	Interest during construction, 4%, 4 yrs.	17,880,150	12,378,673.23	12,378,673.23	.....
40	Interest in terminal properties	1,186,191	549,647.75	502,597.28	502,597.28
	Totals	$138,425,291	$99,015,571.12	$86,332,626.73	$67,615,234.99

* Col. 11, Ex. C.

MINNEAPOLIS & ST. LOUIS.

No.	Subject.	Master, Vol. 1, p. 237, N. P. Record.	Morgan Exhibit K, Vol. 5, M. & St. L. Record, Estimate B, Col. 5 and 6. Reproduction New.	Present Value.	Actual Present Value.
1	Lands for right-of-way, yards & terminals	$5,999,397	$1,872,522.04	$1,872,522.04	$1,872,522.04
2	Grading, clearing and grubbing.....	2,551,960	1,867,784.66	1,867,784.66	1,867,784.66
3	Protection work, rip-rap, retaining walls.	52,240	40,370.00	40,370.00	40,370.00
4	Tunnels	(None)	(None)	(None)	(None)
5	Cross-ties and switch ties.....	1,449,829	971,640.27	530,726.56	530,726.56
6	Ballast	357,855	379,715.97	379,715.97	379,715.97
7	Rails	1,540,392	1,554,760.17	x1,226,638.94	1,226,638.94
8	Track fastenings	258,561	250,640.18	198,337.55	198,337.55
9	Switches, frogs and railroad crossings...	66,807	61,240.25	42,073.48	42,073.48
10	Track laying and surfacing	384,751	251,917.80	251,917.80	251,917.80
11	Bridges, trestles and culverts.....	1,025,827	799,106.63	620,465.26	620,465.26
12	Track and bridge tools	27,791	27,791.00	20,843.25	20,843.25
13	Fences, cattle guards and signs.....	141,606	141,038.05	70,519.03	70,519.03
14	Stock yards and appurtenances	55,704	45,582.49	24,158.63	24,158.63
15	Water stations	80,637	69,322.46	49,880.11	49,880.11
16	Coal stations	25,682	25,682.00	17,815.40	17,815.40

PAGE BOUND

17	Station buildings and fixtures	239,434	230,031.07	137,041.53	137,041.53
18	Miscellaneous buildings	32,901	30,958.15	16,332.92	16,332.92
19	Steam, electric power and gas plans	58,050	62,528.00	50,989.50	50,989.50
20	General repair shops	180,588	180,338.00	123,622.66	123,622.66
21	Shop machinery and tools	101,875	100,074.70	80,059.76	80,059.76
22	Engine houses, turn-tables and cinder pits	148,303	144,427.00	106,097.53	106,097.53
23	Track scales	8,421	6,342.00	4,165.20	4,165.20
24	Docks and wharves	(None)	(None)	(None)	(None)
25	Interlocking plants	15,674	(5)12,800.00	9,216.00	9,216.00
26	Signal apparatus	2,594	2,594.00	1,815.80	1,815.80
27	Telegraph lines and appurtenances	27,109	27,109.00	20,331.75	20,331.75
28	Telephone lines and appurtenances	(None)	(None)	(None)	(None)
29	Solidification of roadbed	(Absorbed)	*608,896.43	608,896.43	608,896.43
30	Engineering, superintendence and legal expenses, 4¾%, 1 to 28	690,364	412,034.21	412,034.21	.....
31	Locomotives	698,163	573,216.62	357,859.13	357,859.13
32	Passenger equipment	341,006	340,342.98	216,832.51	216,832.51
33	Freight car equipment	1,998,345	1,847,949.06	1,276,193.62	1,276,193.62
34	Miscellaneous equipment	86,938	93,906.21	51,347.91	51,347.91
35	Marine equipment	(None)	(None)	(None)	(None)
36	Included in Item 39	.....	137,988.71	137,988.71	137,988.71
37	Included in Item 39	.....	629,457.70	629,457.70	.....

ND VERTICAL IN BOOK

38	Stores and supplies	238,589	238,589.00	238,589.00	238,589.00
39	Freight on construction material, contingencies, interest during construction..	1,834,880	755,349.24	755,349.24	.....
40	Interest in terminal properties.....	1,186,191	549,647.75	502,597.28	502,597.28
	Totals	$21,608,464	$15,343,693.80	$12,950,587.07	$11,153,745.92

* Col. 7, Ex. K.
x In printed record erroneously given $226,638.94.

PAGE BOUND VERTICAL IN BOOK

Evidence for the State Compared With that for Complainants.

It has always seemed to us, that the Master and the learned Circuit Judge, entirely misunderstood the character and effect both of the testimony elicited upon the cross-examination of complainants' witnesses, and that introduced upon behalf of the state.

The burden of proving, by clear and convincing evidence, the claim of confiscation, rested upon complainants at every stage of the case and included the establishment by satisfactory evidence of each element necessary to a determination of that claim. This condition was so fully explained by this court in the recent Cumberland case (212 U. S. 414) that we refrain from further citations.

Relying upon this principle as actual and vital and one by which the evidence would be weighed and considered it was pointed out upon behalf of the state, as we will hereafter show with some detail, that the evidence upon behalf of complainants failed to measure up to the required standard, and it was to emphasize and make this entirely clear that much of the evidence upon the part of the state was introduced.

Thus upon the cross-examination of Land Commissioner Cooper, it was developed that more than 9,000 acres of lands included in the right-of-way in Minnesota of the Northern Pacific were donated, but complainants made no attempt to show the

exact location of those lands nor the amount claimed because of them in the inventory. (Defendant's Exhibit M-1, Cooper, Vol. 9, N. P. Record).

Nearly one-half in area of the terminal lands claimed in Minnesota by the same company were admittedly purchased and held for future use and were not being used for transportation, (Defendant's Exhibit M-Cooper, Vol. 9, N. P. Record) but no attempt was made to segregate those lands and show the claimed value of each class.

The same was true as to areas claimed in streets. Similar deficiencies were developed in the claims as to construction. No construction cost for Minnesota alone was shown. No allowance was made for depreciation nor for the additions secured by the use of the earnings, although admittedly such additions were made (Hill, Vol. 3, pp. 1333-4, G. N. Record). The claim of original cost was shown to include railways purchased after construction and paid for in securities without any testimony as to the fairness of the transaction. Insistant demands were made by defendants for a showing as to the value of outside properties covered and represented by the capital stock, but such evidence was wilfully withheld (Elliott, Vol. 8, pp. 3556-3582, N. P. Record).

The testimony for the state should have been considered in connection with the burden of proof and the character of the evidence produced to overcome the presumption in favor of the validity of the prescribed rates.

Thus Mr. Morgan gave his estimate of market value and reproduction cost separately, he deducted street areas, he allowed for adaptation and solidification of roadbed and deducted a definite itemized amount for depreciation.

While we believe that the evidence for the state affirmatively established that the physical properties were of no greater value than the amounts given by Mr. Morgan deducting, of course, the items we have described as fictitious, our chief complaint is, that the Court wholly misunderstood the main object of the testimony, which was, to establish the practicability of producing the evidence necessary to establish the basic facts upon which, must rest, any conclusion as to the adequacy of the rates.

The Master undoubtedly believed he considered the evidence in the proper light, but in fact having rejected the evidence of the state as insufficient in itself to establish specific values and specific costs, he then accepted *any* testimony offered by complainants and found according to their claims, without considering, apparently, whether such testimony was the best evidence within complainants' reach, or, merely conjectures and opinions, not in truth amounting to evidence at all.

This complete misconception both as to the evidence necessary to overcome the presumption as to the validity of the prescribed rates and the effect to be given to the evidence produced upon behalf of the state is well illustrated by the intimations, both in the Master's report and in the decision of the Court, that the officers of the state committed

themselves to the reproduction method. Even if this were material, it cannot be claimed that any of the appellants or their witnesses claimed that reproduction cost was the basis upon which to predicate rates.

However, there can be no question as to the attitude taken by the public officers and their counsel on behalf of the State of Minnesota in this litigation. The record teems with statements of defendants' counsel objecting to the reproduction method. The cross-examination of each witness called by complainants, demonstrated the same attitude and, finally, the exceptions filed to the Master's findings presented, in concrete form, counsel's position and claim, that the evidence entirely failed to furnish a basis from which fair value could be arrived at and, that the Master entirely failed to find fair value, upon which rates could be predicated. We call particular attention to the statement of counsel for the state, when presenting Mr. Morgan's tables (Vol. 5, p. 1813 N. P. Record No. 599) in which their claim that reproduction cost as applied here was improper is fully stated. Also see Vol. 2, p. 191 et seq. G. N. Record No. 600.

In addition any such consideration is immaterial. The questions involved here are those affecting the public and their determination by this Court will necessarily affect public interests throughout the entire country, therefore no position taken by any public officer or employee can foreclose the action of the Court or prevent it from passing upon the soundness of the claim in itself.

In Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U. S. 339-346, the state stipulated that the operating expenses were as claimed by the railroad company. The Court insisted on knowing what the expenses were incurred for, and a showing that they were reasonable and necessary. It said:

> "While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'
>
> We do not mean to insinuate ought against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate *how easily courts may be misled into doing grievous wrong to the public*, and how careful they should be to not declare legislative acts unconstitutional *upon agreed and general* statements, and without the fullest disclosure of all material facts."
>
> R. R. Com. v. Cumberland, etc., supra.

The result of this attitude, upon the Master's part, was, in fact, to place upon the State the burden of showing the adequacy of the rates and this error is emphasized by the fact that the Circuit Court held the Master's findings overcame any presumption in favor of the validity of the laws attacked. This erroneous view, as to the purpose and effect of the testimony introduced by the state, extends to each branch of the case.

Elements of Value.

Before analyzing "reproduction cost nev" as found by the Master, we desire to briefly refer to certain other factors or elements of value necessary to be considered in arriving at the proper basis upon which to predicate rates.

Original Cost of Construction.

The reason given by the Court (Vol. 1, pg. 418 N. P. Record) for ignoring original cost, namely the great increase in value, is not satisfying. If we assume that present value is to be taken it is nevertheless true that original cost should be considered.

One consideration alone is sufficient to show that the Circuit Court erred in thus departing from the rule given by this Court in Smyth v. Ames. It is, that, by thus ignoring original cost, no distinction, whatever, is made between values accruing from investments of capital and those from earnings used under the designation of operating expenses; a most important consideration.

Commission v. Cumberland Tel. &c. Co., supra.

Mr. Hill said, when speaking of the proper maintenance of the road, Vol. 3, pg. 1333 G. N. Record (No. 601):

> "Well, it covers beyond the maintenance of the property as it was originally constructed."

The learned Circuit Judge referred to the fact of the Master's finding of original cost as though

a finding of the amount was equivalent to giving the fact proper weight in arriving at the ultimate question, i. e. fair value, but the Master's treatment of the matter was exactly the same as though evidence of original cost had been, when offered, rejected as immaterial.

No Evidence of Cost.

Original Cost in Northern Pacific Case was attempted to be proved by "Complainants' Exhibit 15 Gray" (Vol. X, N. P. Record). This statement related to the entire system and *no attempt was made to show Cost of Construction in Minnesota.* Nor was any finding of Minnesota Cost made except by apportioning to that State upon a mileage basis 21% of the cost found for entire system. (Vol. 1, pg. 241 N. P. Record.)

But Exhibit 15-Gray was fatally defective in another respect. It contained an item of $91,150,-127.54 for "Purchase of Constructed Road." This amount is, we understand, the par value of the securities issued and delivered in payment of railways purchased after their construction. For example, the Northern Pacific some years ago purchased the property of the St. Paul and Duluth Railroad Company. Of this purchase, Mr. Gray said (Vol. 2, pg. 359-60 N. P. Record):

> "A. The cost of the St. Paul and Duluth Railroad and its equipment, as shown in the general balance sheet of June 30, 1900, amounted to $10,131,686.45.
>
> Q. As you say, the bonds of the Northern

Pacific Railway Company were issued to pay that?

A. Bonds of the Northern Pacific Railway Company were issued to pay for it, and the Railway Company also assumed certain St. Paul and Duluth Railroad mortgages outstanding."

We find it impossible to determine, from the evidence, what portion of this purchase price represented the St. Paul and Duluth railway and its equipment, and what portion was on account of lands held by it under its land grant, as at the time of the above purchase those lands were placed in the name of the Northwestern Improvement Company, a corporation subsidiary to the Northern Pacific and described hereafter in this brief.

Mr. Gray testified (Vol. 2, pg. 362 N. P. Record):

"Q. What portions of the land grant have been so conveyed?

A. Certain lands were sold to an outside party which were afterward sold to the Northwestern Improvement Company.

Q. What portion of the remaining lands within the land-grant was that?

A. I couldn't say now.

Q. And all of the land-grant of the St. Paul and Duluth road which was still owned by that company in 1890, was transferred to the Northwestern Improvement Company?

A. The Northwestern Improvement Company purchased the land."

That the Master included this total item of $91,150,127.54, in the amount found as original cost, $312,243,555, is apparent from his statement as to the items deducted by him from the total amount claimed by Complainants' Exhibit 15-Gray (Vol. 1, pg. 240, N. P. Record).

The Failure to Show Cost Was Fatal.

We desire most earnestly to urge this consideration. The failure was not from necessity, it was willful. No doubt absolute exactness could not have been secured, but to what extent will a court of equity permit a nominal complainant as in these cases to play fast and loose with evidence which this Court has said to be material. We will again have occasion to speak of the Northwestern Improvement Company and to point out the willful and continued refusal of its officers, who are also the officers of the Northern Pacific, to disclose the value of its assets, but enough appears from the above quoted testimony of Mr. Gray to show that it was a sort of secret receptacle or cover for property of the Northern Pacific.

Master's Finding of Original Cost.

After the production by Mr. Gray of Exhibit 15-Gray, giving Construction Cost to April 30, 1908, as $369,252,755.73, Defendants' Exhibit V-Gray (Vol. IX, N. P. Record) was compiled from the annual reports of the company and presented to Mr. Gray for verification and introduced in connection with his cross-examination. From this we find the total reported cost to have been $273,747,024.25, or $95,505,731.48 less than claimed in Exhibit 15-Gray. At the same time and from Mr. Gray's testimony there was compiled "Defendants' Exhibit MM-Gray

(Vol. IX, N. P. Record), this was in like manner submitted to Mr. Gray for verification and introduced in connection with his cross-examination.

Defendants' Exhibit MM-Gray is entitled:

"Statement of Amounts of Cash Invested and Remaining Invested in Northern Pacific Railway."

At the time of its introduction the following was said, Vol. IV, pg. 1162, N. P. Record (No. 599):

"Q. Mr. Gray, we have attempted to make an extract from your testimony as given when you were last upon the stand, to show the amount of actual cash invested from private purses in the Northern Pacific Railway Company from its organization to the 30th of April, 1908, and the amount of that investment which still remains invested in the Northern Pacific Railway Company; that is, where bonds or stocks have been redeemed without regard to where the funds for such redemption came from, the amounts so redeemed have been deducted from the investment, leaving a statement of the amount of cash received from private purses (if I may use that term) still remaining invested in the Northern Pacific Railway Company; and this statement is further exclusive of all sums received by the Northern Pacific Railway Company from land-grants and bonuses, and also excludes any portion of the earnings which may have been invested for permanent improvements or for equipment; so that it is a mere statement of the amounts still remaining invested which have been received, as I have said, from private purses or private individuals. I now hand you Ex. MM-Gray, which is the statement prepared upon the theory which I have explained and which, as I say, purports to be a statement of your claims as to that net investment. I ask you, in the first place, to notice that there are certain ink corrections in this statement.

A. Yes.

Q. Will you please examine that statement and say when you have sufficiently examined it?

A. Well, I have already examined a copy of this statement this morning in connection with Mr. C. W. Hillman, and the statement is approximately correct as showing what you claim it does show. I am not able to say exactly as to that; it is what might be called an 'E. & O. E.' statement; that is, there may be small differences, but I believe it is substantially correct.

Mr. O'Brien We offer Defts'. Ex. MM-Gray in evidence. I understand this to be the statement which the Master requested to have made.

The Master: I assume that it is, from your question, what I desired to have worked out from Mr. Gray's statement."

The total cash invested as shown by Defendants' Exhibit MM-Gray, was $279,811,715.92. Of this, $60,000,000 was in part payment of the new $95,000,000 stock issued shortly before this litigation arose and was intended as we understand for new construction and projected lines, an instance of which was the Spokane, Portland and Seattle Road not included by the Master in the property valued, Master's Report, Vol. 1, pg. 246 N. P. Record (No. 599), deducting therefore this amount, $60,000,000, we have as the total investment $219,811,715.92.

We refrain from commenting upon the fact that while according to his own statement the Master was desirous of having this statement prepared, he seems to have entirely ignored it in his findings.

Had this evidence been supplemented by evidence of Construction Cost in Minnesota, at least as far as possible, by a proper segregation of the property purchased from the St. Paul and Duluth railroad, a similar analysis of the other properties purchased and some evidence from which could be fairly determined the values accruing from capital, as distinguished from those secured by the use of earnings, original cost would form a most valuable and important element in arriving at fair value.

We realize very fully the enormous mass of tabulations and statements presented by Complainants in these cases. If sound and fury were evidence we would find an abundance, but there was upon this, as upon every other branch of these cases, a substantial failure of evidence to support the Master's findings of basic facts.

Therefore, because there was no evidence to justify the finding of original cost and because having made a finding, it was then ignored, no conclusion as to fair value which can be accepted by this Court was reached by the Master.

Refusal to Show Original Cost.

The failure to show original cost was deliberate, as clearly appears from the record. Thus in the Northern Pacific case, when Mr. Cooper was testifying, a question of procedure arose and one of complainants' counsel said, during a statement beginning p. 1067 and ending on p. 1068, Vol. 3, N. P. Record (No. 600):

> "* * * If his theory is wrong, the Master will find that it is wrong, and if he should have to put in evidence of what this property was worth when the Indians were here, then we shall have no case, because I shall not attempt to prove it."

In the Great Northern case, not only was no satisfactory evidence of cost offered by complainants, but the representatives of the state were refused access to the books of the corporation in their efforts to find cost.

Upon formal application to the Master, an order was made directing that an examination of the books be permitted. Vol. 4, G. N. Record (Simpson v. Kennedy, No. 600), pages 1754-1763, inclusive.

The testimony given upon behalf of the state by Mr. Hillman after this examination will be found Vol. 4, pp. 1764-1910, G. N. Record No. 600, and his tables in connection therewith are "Defendants' Exhibits K-1 to K-9 Hillman."

The Master found the total book value to be $295,401,213, Vol. 1, p. 242 N. P. Record (No. 599), and, while this was much more than claimed by the state, it is not necessary to enter into the details.

In the Minneapolis & St. Louis case the Master found the book cost of the entire system to be $28,574,225, which, divided on a mileage basis, he found assigned to Minnesota $17,127,390, (Master's report, Vol. 1, p. 242, N. P. Record No. 599).

Speaking of actual cost of construction, the Master said (Vol. 1, p. 240 N. P. Record No. 599):

> "This could be shown only by the books and records of the two companies, the Northern Pacific and Great Northern, and in the early history of the original companies these are somewhat obscure and uncertain and, by reason of lapse of time, cannot be verified by other proof."

After discussing these findings the Master used the language we have already quoted, Vol. 1, p. 243 N. P. Record:

> "The Master is thus confirmed in his opinion that the cost of reproduction new is the fairest and most equitable basis upon which to predicate rates, both for the carrier and the public, and he has accordingly adopted it in these cases."

It is therefore apparent that,

(a) No evidence of original cost of properties in Minnesota was offered.

(b) No finding of cost for Minnesota was made.

(c) The evidence of cost of entire systems, ignored necessary distinctions in property used, and the findings are equally defective, and finally,

(d) The findings actually made were ignored.

We submit that this is not "considering" original cost, but is, in fact, ignoring it. If it is a material element to be considered in arriving at fair value, each of the complainants has failed to sustain the burden resting upon him and the findings are insufficient to support the ultimate conclusion.

STOCKS AND BONDS.

We will not discuss market value as distinguished from par value of stocks and bonds and hereafter refer only to par value.

The Master found this in the Northern Pacific case to be, April 30, 1908, (Vol. 1, pg. 239 N. P. Record):

Capital Stock	$215,539,634.99
Bonds	190,256,577.66
Total	$405,796,392.65

Of the above stock only $155,000,000 can be considered, the balance, $60,539,634.99, simply represents subscription receipts on account of additional stock to be issued to the amount of $95,000,000. Complainants' Exhibit 14-Gray (Vol. 10, N. P. Record).

At the time testimony was being taken certain extensions were being constructed, notably the Spokane, Portland & Seattle road, and as this account, together with cash on hand and surplus were not included in reproduction cost it is evident that for comparison or consideration the proposed new stock and all payments made upon it must be eliminated.

That, even this amount greatly exceeded actual investment and contained an unusual amount of "water" is fully disclosed by the evidence. Inasmuch as the Court sustained the Master in refusing to consider "the amount and market value of

its bond and stocks," as this Court in Smyth v. Ames directed should be done, it is unnecessary to discuss this in detail, as here again as in the case of original cost, we have a complete failure of evidence coupled with a refusal by the Court to recognize the failure as material.

The financial history of the Northern Pacific was after many days of effort, by Counsel for State, to obtain a coherent statement, very fairly given by Mr. Gray, the Comptroller of that company, in a carefully prepared statement, beginning at Vol. 3, pg. 906 N. P. Record.

The first authorized stock was $100,000,000; of this there was issued without any monetary consideration $49,000,000 Common. When the reorganization of 1896 took place this stock was accepted at par for new stock at par upon the payment of $15 per share, so this $49,000,000 stock represents an investment of 15% of that amount or $7,350,000.

The outstanding securities January 1, 1896, were, funded debt $168,797,000 (Gray, p. 922) and about $85,000,000 stock, total $253,797,000. The reorganization plan provided for stock $155,000,000, bonds $190,000,000, total $345,000,000, of which the reorganization absorbed $316,000,000 and the balance were sold at a heavy discount (Gray, p. 927).

The profit to the reorganization syndicate if computed upon the par value of the securities taken by it as part of the reorganization plan was $22,202,393, (Defendants' Exhibit Y-Gray, Vol. 9, same record); if computed upon the then quoted market

value of the securities, there was a profit of $2,748,663.50, (Gray, pg. 926, same record). To retire the new bonds at the date at which the old bonds would have matured, pay annual dividends at 7 per cent upon the new stock during the same period and then retire both at par, would require $82,121,270.36 more than would have been required to have matured and retired the old securities upon the same bases, interest in each case computed at the respective rates named in the bonds (Defendants' Exhibit Z-Gray, Vol. 9, N. P. Record).

To absorb or justify or conceal this increase in capitalization without any corresponding increase in investment, the amount claimed as total cost of construction and equipment in the first annual report by the new company to the State was $96,392,882.94 greater than that amount as given by the receivers in their last report.

See Gray's testimony (Vol. 3, pg. 636 N. P. Record).

It is unnecessary to compute the enormous extent to which these securities may be inflated,—by a stock dividend for example,—if the reproduction cost found by the Master is affirmed by this Court as the present value of the physical properties. It is a matter of common knowledge, which we feel justified in referring to, that since the decision of the Circuit Court steps have been taken by the directorate of the Great Northern to issue bonds to the amount of $600,000,000.

Complainants' Refusal to Furnish Evidence of Property Represented by Capital Stock.

The Master in rejecting amount or market value of bonds and stocks as an element to be considered said (Vol. 1, pg. 239 N. P. Record):

> "* * * but it must be noted that the value of stock is based on all the assets of the company and is not limited to value of property (devoted) to public service and its balance sheet for the whole system of April 30 1908, (Exhibit CC-Gray), shows a clear surplus $52,900,073, while some of its assets, notably the Northwestern Improvement Company stock, is apparently of far greater value than as listed."

This hardly tells the story of the Northwestern Improvement Company nor of the willful and persistent refusal by Complainants to furnish evidence of the value of its holdings.

Northwestern Improvement Company.

This company, all of the bonds and stock of which are owned by the Northern Pacific Railway Company, was organized under the laws of New Jersey in 1897 and has gradually accumulated properties of vast value, consisting in part of coal, iron ore and other lands. The value of its coal lands alone was given by Mr. Cooper (Vol. 2, pg. 140 N. P. Record) at $50,000,000. We were unable to obtain any estimate of the value of its iron ore lands. To it were conveyed some part of the original land grant of the Northern Pacific, and the

portion of the lands granted to the St. Paul and Duluth, remaining unsold when that railway was purchased by the Northern Pacific. From time to time, during the trial, demands were made by counsel for the state for a statement of the values of such holdings, but always without avail.

Finally Mr. Elliott produced a statement giving a history of the company to which was attached a balance sheet or statement of book values, but not at all the real value, nor Complainants' claim of value. This statement gave the total book value as $13,272,173.93, (Vol. 8, pg. 3561-2-3 N. P. Record), but it appeared that in 1908 the Northwestern Improvement Company paid over to the Northern Pacific in round numbers $17,000,000 which was distributed to the stockholders of the railway company and amounted to a dividend of about 11% upon the stock of the Northern Pacific.

Mr. Elliott's statement—he was then president of both companies—and his testimony upon it and the statements defining the attitude of the parties to the litigation, will be found in Vol. 8, Northern Pacific Record (No. 599), pg. 3556-3582, inclusive. To illustrate Complainants' attitude we quote the following (p. 3568):

> "Mr. How: Another thing I might as well state. I don't want to raise this question while Mr. Elliott is on the stand—he is willing to testify as to everything he knows anything about—but if counsel are going into the values of the Northwestern Improvement Company to the extent of any lengthy examination, I shall encourage the witness not to answer, on the ground that it is impertinent and has noth-

ing to do with the lawsuit. That question will have to be tried out before the witness will answer with my consent, Mr. Young.

The Master: Didn't you put in testimony of that character?

Mr. How: No, sir."

Similarly at page 3581:

"The Master:—On the proposition made. But, as I understand, the testimony is not here as yet and it is not proposed to bring it here. Of course, the parties must take the responsibility of not getting it here if it is material.

Mr. How: It looks as though we should have to do that. * * *"

It is therefore respectfully submitted that the complaining stockholder, had his choice, to prove the value of his stock and the proportion of it which represented property devoted to transportation, or, if he preferred for purposes of his own, to conceal its value, to leave the Court of Equity whose aid he had sought upon the alleged claim that his property was about to be confiscated. Instead of this the Court contented itself with ignoring the amount and market value of bonds and stocks, because, in the absence of evidence deliberately withheld, such amount or value furnished no proper basis for rates.

In the Great Northern case the par value of the stock, at the time suit was commenced, was $149,577,500 and of bonds $83,119,939 (Master, Vol. 1, p. 240 N. P. Record No. 599). We have, therefore, throughout given those securities in the above amounts, although the Master finds they were subsequently increased to a total of $307,918,689.19 (Master, same page). As to the excessive amount

of this capitalization we respectfully refer to the findings of the Interstate Commerce Commission in

City of Spokane v. N. P. Ry. et al, 15 I. C. C. Rep. 376; see pp. 403-405.

In respect to property owned by the Great Northern and represented and secured by this capitalization the situation was practically the same as in the Northern Pacific case; the Master, after stating the market value of the securities, said (Vol. 1, pg. 239 N. P. Record):

> "Of this amount a very considerable sum must be predicated on property not devoted to the public service. * * *"

A RAILROAD CANNOT INSIST UPON A RETURN WHICH IS EXCESSIVE IF BASED UPON ITS CAPITAL STOCK.

This is the first time, so far as we know, in an investigation as to the adequacy of prescribed rates, a court has said that the basis for return may exceed the capitalization of the public service corporation.

The aggregate capital stock of a corporation is the public representation, made by it, of the amount of the funds and properties combined under the organization; it is the basis upon which dividends are paid, control secured, and is required to be fixed by the charter for the security of the public at large, as well as those dealing with the corporation.

Barry v. Merchants Exchange Company, 1 Sandf. 280-305.

Thompson on Cor., § 3404 et seq.
Morawetz on Private Cor., 2nd Ed., § 781.

A transfer of the entire stock would carry with it all the corporate property.

The claim that a basis for return greater than bonds and stocks might be found was advanced early in these cases, but startling as it then appeared, it did not go to the length which the Circuit Court finally did in determining "value" by "reproduction cost new" under the forms and assumptions indulged in here.

At pages 380-1,—Vol. 2, N. P. Record No. 599, the following statement by counsel for complainant appears:

> "Mr. How: Counsel misapprehend—as they appear to have misapprehended from the beginning—what the object of the bill of complaint is in this suit. I have tried to relieve them of that misapprehension; I hope the Master will not rest under it, or not get under it at all. The stockholders are not complaining that they do not get dividends; they are not suing the railway company for that purpose, they are suing the railway company to compel it, if it can, and suing the state to compel it, to allow the corporation, if it must, if it is proper that it should, to obtain a fair return upon the value of the property of the Northern Pacific Railway Company devoted to public use. Now, it makes no difference to anybody what dividends the stockholders get. We say that corporation, under these laws complained of, will not get a fair return upon the value of its property devoted to the public use. I hope nobody will get away from that, because that is the object of this suit. We do not say a word about a dividend in our bill of complaint, nor increment to the stockholders,

and if the stockholders started with a corporation worth one hundred millions of dollars in property and that property has increased so that it now is worth six hundred millions of dollars, the stockholders are entitled to a return, at least the corporation is entitled to a return upon six hundred millions of dollars and a reasonable return; and they are entitled to issue stock representing that six hundred millions of dollars, and that stock is not watered, nobody is defrauding anybody; the value has come from the growth of the country; and I want to protest against the idea that a railway corporation—the most hazardous of all enterprises perhaps—is not entitled at least to the increment of increase in the value of its property through honest, straightforward, earnest, careful, conscientious business dealing for a generation. Now, that is all we insist upon and all we ask for. We ask for a fair and reasonable return upon the value of the property devoted to public use. If we have capitalized it at a hundred dollars, or capitalized it at a billion dollars, so far as its capital stock is concerned, it can cut no figure."

It will be observed, that, the right to increase the stock by capitalizing the additional values,—as we have suggested may occur, if, the establishment of value depends upon reproduction cost as here found—is boldly asserted in the foregoing statement. When it is remembered that 'reproduction cost," is a mere theory dependent upon opinion testimony, in giving which each witness indulges in any presumption his fancy dictates, it seems unthinkable that it should be taken to justify rates which would be exorbitant if computed upon the actual capitalization of the company.

Return on Capitalization.

We have already, in our preliminary statement of facts, shown that a return of 7% upon reproduction cost, allowed, after payment of interest, 15% upon the stock of the Northern Pacific and 18% upon that of the Great Northern, which leads to the following computation as to the last named company.

The amount required to pay 5% interest upon its bonds $83,119,939 would be $4,155,996.95 and 7% upon its stock $149,577,500 would be $10,470,425 aggregating $14,626,421.95. This amount as a net return would be almost exactly 3.2% on $457,121,469 the "cost of reproduction new" found by the Master.

Whatever proportion of this reproduction cost should be assigned to Minnesota Intrastate business would of course represent only an equal proportion of the total bonds and stocks, so that 3.2% upon the reproduction cost so assigned would pay interest on the proper proportion of the bonds and 7% upon the proper proportion of the stock assignable to that business.

The Master, as already pointed out, found a net return from intrastate business on the Great Northern of 3.359% upon "reproduction cost new" assigned by him (Master's report, Vol. 1, p. 270 N. P. Record), which is consequently sufficient for net dividends of more than 7% upon capital stock similarly apportioned.

A similar computation as to the Northern Pacific will be equally conclusive, the return being somewhat smaller, but sufficiently large to dispel all doubts as to the adequacy of the return if based upon the par value of the securities, which we insist is obviously an excessive basis.

It is submitted—unless it can be said, that, as a judicial question, rates which allow, after the payment of every possible expense, a net return equal to 7% upon the par value of the capital stock, may still be so inadequate as to violate the Federal Constitution,—the claim of confiscation in these cases must be denied and the decrees reversed.

Proper Method for Estimating Replacement Cost.

In discussing the different elements going to make up fair value, reproduction or replacement has often been referred to by this and other Courts, as in Smyth v. Ames, where, in naming the different elements to be considered, it was said:

> "* * * The original as compared with present cost of construction * * *."

Just as "property devoted to the service" means property which the carrier has contributed, so "present cost of construction" or "cost of reproduction" means the present value of an item of physical property as shown by the going price of a similar article upon the market, and it was never intended to permit the fiction of reconstruction itself, to increase the prices, so taken.

The same perversion of language, to which we have alluded in the case of "property devoted to the service," as made by Complainants, was also resorted to in applying the test of "reproduction cost" and apparently by mere iteration and reiteration together with a mass of immaterial but confusing tabulations, the Master, and in turn the Court, were led into accepting the particular and exaggerated reproduction cost, claimed in these cases, as the sole and most equitable basis upon which to predicate rates.

The suggestion that this is a coherent method for showing present value is not altogether

new; it has found some support in the tax commissions of one or two states and has occasionally been suggested as proper in a valuation for rate-making.

The impropriety of some of the methods adopted in these cases has already been pointed out in former decisions of this Court, but there are many other errors here which we think are now, for the first time, before this Court.

In the Knoxville case (212 U. S. 1) where replacement value was considered, real estate was taken at its real value without the addition of any multiples or imaginary expenses.

We give the following references to the printed record in that case:

Wingfields Est. (for Water Co.), Vol. 2, pp. 1948-1961.

Wheelers Est. (for Water Co.), Vol. 1, pp. 332-394.

Brown (for City), Vol. 2, p. 1835-1846.

The estimates included interest during construction and similar items which we think purely fictitious. No reference to interest was made in the opinion written in that case, but, with reference to the items "organization, etc., and" "going concern" this Court said, p. 9:

> "We express no opinion as to the propriety of including these two items, in the valuation of the plant, *for the purpose for which it is valued in this case*, but leave that question to be considered when it necessarily arises."

The item, organization, promotion, etc., should, we think, be classified with the items here describ-

ed as engineering and legal expenses, contingencies and interest during construction. It was not necessary in the Knoxville case, nor did this court enter into the minutia of the method there followed, as the valuation as a whole was rejected, for the reason that the Master had failed to allow for depreciation. The decision in the Knoxville case was rendered while testimony was being taken in these cases and unless the Master's conclusion that, (Vol. 1, p. 244 N. P. Record (No. 599),

> "• • • knowledge derived from experience, adaptation to the needs of the public and readiness to serve, together with physical appreciation of roadbed and a reasonable amount of working capital always on hand for immediate use, are matters of value which will fully offset depreciation arising from use and weather stress,"

is sufficient to distinguish these cases from the Knoxville case, we submit the valuation here must fall if for no other reason than that the Master failed to allow for depreciation.

In the Willcox case (212 U. S. 17) real estate was taken at its actual value. (Vol. 1, p. 163 printed record.) Some of the lands were not at the time used for the gas business of the company and as to some lands its title was disputed. Both classes were included by the Master (Vol. 1, p. 164 printed record), but stricken from the inventory by Circuit Judge Hough.

157 Fed., pp. 857-8.

In addition to all this, it was held in both of those cases that the rates were adequate, practic

ally upon the excessive basis adopted, although as we have pointed out, the return, if computed upon the par value of capital stock, would be little more than 3%.

In the Cumberland case (212 U. S. 414) the valuation was rejected as it included capitalization of earnings and it was held that the duty of segregating the property, so acquired, from that acquired by the investment of capital, rested upon the complainant. Nothing of the sort was attempted here, although the fact that similar conditions existed was developed upon the cross-examination of witnesses produced by complainants.

THE METHOD AS CONSIDERED BY INTERSTATE COMMERCE COMMISSION.

At different portions of the record references will be found to the Spokane rate case.

City of Spokane v. Northern Pacific Railway Company, et al., 15 I. C. C. Rep. 376.

Many of the tables introduced by Complainants here were first prepared for the Spokane case, some being afterwards modified for use here, generally by adding to the amounts claimed. The Spokane case was decided February 9, 1909, so the theory of reproduction cost had been submitted to the Commission sometime before that date, and its members had occasion to study the question very fully before it was again pressed upon their attention in the "Western Advance Cases" (20 I. C. C. Rep. 307).

In the Spokane case the Commission did not find it necessary to come to a final conclusion as to the value or propriety of the method, but discussed the showing made and the different elements entering into the estimates in a way to show not only the importance of the questions involved, but the careful consideration being given to them by the Commissioners. When, therefore, the same claim came before that body two years later its members were in a peculiarly good position to reach a final and well matured conclusion upon the question.

By this time the railways of the country had evidently determined to make a united effort to establish "reproduction cost" as used and interpreted by them, as a basis for rates and we find the formula presented to the Commission in "Western Advance Cases" a duplicate of Complainants' final claims and the conclusion of the Circuit Court in the cases at bar.

We quote as follows from the decision (page 337):

> "Rejecting or disregarding these arguments as to the need for greater revenue to support credit and surplus, the Chicago, Burlington and Quincy Railroad Co. presents another ground of justification for advancing the rates under consideration. It is entitled 'as a matter of legal right to a fair return upon the actual value of its property used for transportation, which value, from whatever source in the past created, is measured in its case by at least the cost of presently reproducing its physical plant. To obtain such fair return, it necessarily and equally is entitled to charge in the aggregate rates of transportation which, subject to the one limitation that the particular

component rates are themselves reasonable and just to the shipper, will produce such reasonable return upon the property employed.'

"From this postulate the Burlington proceeds to the conclusion that it does not now enjoy a fair return, and finding itself confronted with the need of additional revenues to meet wage advances and other operation and maintenance charges and to offset diminishing net earnings, it may, as a matter of legal right, advance the rates upon the commodities selected, inasmuch as the advanced rates would be reasonable in view of the value of the service to the shipper. Logically it refuses to have its position regarded as an attempt to justify these higher charges for in its theory it does not need to justify them, and what it presents to the Commission is termed an 'explanation of them and of the occasion for their imposition.'

"Here is a proposition at once novel and searching. The Burlington road may be taken as representative in that territory. Its traffic is diversified; its capitalization comparatively conservative; its credit excellent; its tonnage large; and management capable. When asked by the Government to explain why it has increased its charges, its reply is that it has a right to do so because it is not now receiving a fair return upon the value of the property which it uses; value being estimated cost of reproduction. This leads to a few questions: (1) What did the Burlington road cost those who built it? (2) What is its present value? (3) Whence came this value? (4) Is such increase in value a basis for increase in rates?

"The controller of the company has given us, then, answer to the first question. He testified that the total investment in the property from the sale of stocks and bonds was $258,000,000.

"To the second question the company answers that its present value is $530,000,000.

"The difference between the two figures repsents, (1) Investment in the property made

out of earnings; (2) Increased value of right-of-way and terminals owned by the company. This is the answer to the third question.

"The position, therefore, taken by the Burlington is that it has a right vested in it by law to add to its freight charges such amounts as will yield at the present time a fair rate of interest upon more than $270,000,000, which does not represent either the proceeds from the sale of a share of stock or a dollar of borrowed money, so long as the rate to the shipper is not unreasonable.

"This contention opens up the broadest field of inquiry, as to the questions of law and fact upon which the Commission could enter. We have before us a property constructed by private persons under authority of government to be devoted to a public use. These private persons invest in that property the issues of certain sales of stocks or bonds amounting to $258,000,000. They capitalize this property at $320,000,000, one-third of which capitalization is represented by stock and two-thirds by bonds; they carry upon their books the cost of road and equipment at $364,000,000; and they now insist that the law gives them the right to a return upon $530,000,000."

And finally, at page 339:

"Notwithstanding these decisions, it remains for the Supreme Court yet to decide that a public agency, such as a railroad created by public authority, vested with governmental authority, may continuously increase its rates in proportion to the increase in its value, either (1) because of betterments which it has made out of income, or, (2) because of growth of the property in value due to the increase in value of the land which the company owns.

"If the position of the Burlington is sound and is a precise expression of what our courts will hold to be the law, then as we are told there is certainly the danger that we may

never expect railroad rates to be lower than they are at present. On the contrary, there is the unwelcome promise made in this case that they will continuously advance. In the face of such an economic philosophy if stable and equitable rates are to be maintained, the suggestion has been made that it would be wise for the government to protect its people by taking to itself these properties at present value rather than await the day, perhaps 30 or 50 years hence, when they will have multiplied in value ten or twenty fold."

We hope and believe we are able to show in the following pages of this brief that the above statement by the Commission was ultra conservative. It is one which would give pause even if the value so claimed was or could be thought to be actual present value, but how much more alarming the claim is when it is bottomed upon false and fictitious assumptions used admittedly as elements of value in themselves or as justifying of themselves enhanced unit prices.

We most earnestly urge upon the attention of this Court the two decisions of the Interstate Commerce Commisshion to which we have referred. Each consideration connected with this branch of these cases is so fully and clearly set out in those opinions that we feel this court will find in them a much more satisfactory discussion of the problems involved than we are able to present. The identity in the positions assumed by the railways here and before the Commission shows how far reaching will be the effect of the conclusion to be announced in these cases and finally the financial histories of the Northern Pacific and Great North-

ern Railways as given in the Spokane case, 15 I. C. C. Rept. 376, are excellent summaries of much of the evidence given in these cases as to those companies.

We proceed to analyze what the complainants, the Master and the Court meant by "cost of reproduction new."

Analysis of Testimony and Findings as to Reproduction.

The methods followed in each case for the ascertainment of reproduction cost were practically the same. The Northern Pacific case was the most thoroughly tried and the testimony in that case was most voluminous upon every litigated question. We can generally fully illustrate all these cases by the testimony in the Northern Pacific Case, (No. 399), and will only refer to the others when necessary in special instances.

The general order of proof was as follows: In the Northern Pacific Case, Mr. Darling, Chief Engineer, presented a statement, "Complainants' Exhibit 2-Darling," containing an estimate of the cost of reproducing the entire system. Another statement, "Complainants' Exhibit 3-Darling," contained an estimate of the cost of reproducing the system in Minnesota. With these were presented several detailed tables and computations, all having reference to and carried into the main statements, Exhibits "2" and "3" Darling.

The land values given in Mr. Darling's statements depended upon the testimony of Mr. Cooper, Land Commissioner of the road. His claims as to the cost of reproducing the lands contained in several exhibits are brought together and embodied in "Complainants' Exhibit 9-Cooper, Revised."

In the Great Northern case the complete claim is contained in Complainants' Exhibit 2-Hogeland. (Vol. 5, G. N. Record No. 600.) The land values

depend upon the testimony of Mr. Hayden, Land Commissioner of that company, and his claims in that respect are brought together upon the last page of Complainants' Exhibit 9-Hayden. (Vol. 5, G. N. Record No. 600.)

In the Minneapolis & St. Louis case the claim is found in Complainants' Exhibit 28-Cutler. (Vol. 5, M. & St. L. Record No. 601.)

LAND.

In the Northern Pacific case, Land Commissioner Cooper said, Vol. 7, pg. 3080, N. P. Record (No. 599):

> "Q. So that, in all of the work which you have done, Mr. Cooper, you have assumed that your attention should be constantly directed to the cost of reproduction?
>
> A. Yes, sir.
>
> Q. Now, if what you were endeavoring to arrive at was the market value of the real estate, not exclusively for any one purpose but simply giving it its best value for the purpose for which it was best adapted, to be purchased by a purchaser who was willing to buy, but not compelled to buy, and to be purchased from an owner who was willing to sell but not compelled to sell, entirely different methods would have to be used, would they not?
>
> A. Yes.
>
> Q. And an entirely different conclusion would be necessarily arrived at as to the value?
>
> A. I think that is correct; I think that would follow."

At Vol. 2, pg. 136, same record, he gave the following testimony:

> "Q. Mr. Cooper, what elements do you consider in determining the cost to the Railway

Company of right-of-way, for instance, which it is necessary for it to have?

A. I assume you mean what elements I consider in determining the price that we should pay for property?

Q. The price that you will have to pay, yes.

A. There is the value of the area taken; there is the severance damage, or the damage resulting to the area not taken by the severance; there are the improvements on the area taken; there is, also, the damage that there may be to improvements on the area not taken."

* * * * *

And again, same record, pg. 173:

"Q. Now, let us understand just what you mean by the cost of reproducing the naked ground.

A. I mean the cost, what it would cost the Northern Pacific Railway Company, or any other railway company, to purchase this naked ground today.

Q. Well, do you consider that there is a difference between what it would cost you to purchase it and its value?

A. Yes, sir, very decidedly.

Q. Well, now, just state what difference there would be between its value and what it would cost to purchase it.

A. A railway company cannot purchase property at what would be deemed its value. That is my experience, and I have explained that yesterday repeatedly, that we cannot do so. Therefore, what would be ordinarily termed the fair value of a piece of property, a railroad company seeking to acquire it cannot hope to purchase it for that."

Mr. Cooper had explained that when the valuation of lands was entered upon, all of the railway companies had agreed upon the employment of three real estate dealers in each of the cities con-

taining large terminals, St. Paul, Minneapolis and Duluth, to appraise the lands and make a report to the companies.

On cross-examination Mr. Cooper testified, Vol. 2, pg. 184 N. P. Record (No. 599):

> "Q. You said, as I noted your testimony as to the values of the properties in St. Paul, that after you got from these men who examined them their valuations of the land, you added what was your judgment of the cost of the buildings?
>
> A. I added a percentage to their figures to represent the cost of buildings that might, and in all likelihood would, be sure to be found there upon some or all of the property if any company was attempting to purchase it. In other words, we were figuring on a large area of land. If that land was not occupied by the Northern Pacific Railway Company or by some other railway company, it surely would be built up to some extent, and if any company sought to acquire it, it would have to pay for those buildings, and that was one of the items to cover which the percentage was added. A very excellent illustration of that situation is found in the Commercial street property, that we discussed here this morning, and of which an exhibit is in this case. * * * That situation with reference to this property explains what I have been trying to convey, that in purchasing a large tract of land, such as this, for railroad purposes, you are generally able to buy some of the property at about its fair value; as you go on buying, your purpose becomes known or surmised, the prices increase, you cannot change your location, you have got to keep on to the end; therefore, you are at the mercy of the owner of the property, excepting such protection as is afforded by your right of condemnation. Also, you can't acquire a large tract of land such as this in

any large city without running into more or less improvements such as we find on this tract, the big plant of the Standard Oil Company, the Pintsch Gas Company, this large Robinson and Cary warehouse, and we considered ourselves particularly fortunate in this tract that there wasn't more improvements on it. It would be difficult, in fact to find a tract of land of that size anywhere in St. Paul on the water-level available for railroad purposes that there wasn't more improvements upon; so that what we have purchased cost us thirty-three cents a square foot, or a total of $271,-724, and covers eight-tenths of the total area. We estimate that for the remainder of the tract, containing 139,574 square feet, we will pay $418,500, or three dollars a square foot."

Cooper, Vol. 7, pg. 3106, same record:

"Q. Your claim is now that, for the purpose of ascertaining the value of the Northern Pacific property comprising those terminals—the land, you can neither take the original investment, nor the value of that land as determined by the value of contiguous land, but that, for the purpose of determining its value, so that what is a proper return may be found, it is necessary to proceed upon the theory that the company is now compelled to purchase that land, at this time, under all of the circumstances, subject to all of the extra and additional expense which a railroad company is at at the time it makes a purchase of land; is that a true statement of your position?

A. That is correct.

Q. And you have not attempted here to base your estimate of the value of this land, either upon the original investment, upon the actual cost to the company, upon the basis of average increase in contiguous land, or upon any other theory than the one I have described and which you referred to as the cost of reproduction?

A. That is right.

Q. And it is true, Mr. Cooper, that if you were to determine the value of the land by any of these other methods which I have suggested, the inevitable result would be that the value of the land as found by you would be much less than the value which you have given?

Mr. Butler: The reproduction cost, you mean?

Mr. O'Brien: Or the reproduction cost.

A. I have not attempted to figure it out, of course, on any other basis except the one that has been used as I have explained in this case. I think that the result would be as you say, that it would be lower."

* * * * *

Cooper, Vol. 7, pg. 3111, same record:

"Q. So that, in every case, what you call the market value is the value of contiguous or similarly situated property, with the additional amount which a railroad company is ordinarily compelled to pay?

A. That is right.

Q. And what you have designated in your report and in your testimony as right-of-way value is your definition of the market value of railroad property with the additional element of severance damage, cost of improvements useless to the railroad company, and general expenses of acquisition?

A. And such items as we read this morning, damage to the property not taken at all, changing channels and things of that kind.

Q. So that in no instance have you given the market value of the property upon the basis of the market value of general property surrounding it or the market value of that property purchased by one who was not acting on behalf of a railroad company?

A. That is right.

Q. And if you were to give the market value on the ordinary basis, leaving out those

elements of increased cost, your market value would be much smaller?

A. It would be smaller, yes."

Cooper, Vol. 7, pg. 3118, same record:

"Q. And you are unable to state how much, upon the average, you have added to the true or normal market value, to allow for the additional amount which the Railroad Company would have to pay upon the hypothesis that it is now compelled to purchase the land?

A. That is correct."

Mr. Cooper was then testifying in rebuttal towards the end of the trial, the last question and answer upon his cross-examination at that time were, Vol. 7, pg. 3119 N. P. Record (No. 599):

"Q. And while you are able to show, and we can ascertain from an inspection of your testimony, the amount of the difference between the market value to the Railroad Company, as you have described, and the right-of-way value, and, in the rural communities or agricultural districts, the difference between the market value to you and the right-of-way value, there is nothing in any of your exhibits which will show, nor are you now prepared to state, the difference in what might be termed the normal, true, ordinary market value of the lands to the ordinary individual, and the sum which you have fixed as the market value to the Railroad Company if it were now compelled to purchase?

A. That is correct."

From the foregoing it will be seen that Mr. Cooper assumed three standards; first, ordinary market value; second, railroad value; third, reproduction cost.

"Railroad value," was a sum arrived at by estimating the excessive cost to a railroad, acquiring in

one body a large tract of land, being thus, it was asserted and assumed, compelled to pay *excessive prices* for some portions necessary to maintain the continuity of the way, and, because some portions, so necessary, would be found *improved by buildings* which the railroad would be compelled to purchase notwithstanding their uselessness to the company.

Reproduction cost being the sum of this railroad value and an amount designated "severance damage," or the amount abutting property would be damaged if the severance from it of the right-of-way took place at this time.

The first standard or ordinary market value was not given by Mr. Cooper nor could it, as he admitted in the last quotation we have given, be obtained from his testimony.

The Master accepted Mr. Cooper's method, and found the land had a "railroad value." This value he found the St. Paul and Minneapolis appraisers had included, but he still added 5% for severance damage and thus found and allowed reproduction cost.

In Duluth the Master found the appraisers employed by the companies had valued the lands

> "* * * with reference to the adaptability of the property for general business enterprises and not to have taken into consideration their special and increased value for railroad purposes,"

and thereupon he arbitrarily added 25% to obtain "reproduction cost." Vol. 1, p. 222 (N. P. Record, No. 599).

In the Great Northern Case (No. 600), the chief witness as to land value was Mr. Hayden, Land Commissioner of that company.

We quote, as follows from his testimony showing that the same method was followed in that case.

Vol. 2, pg. 171-2 G. N. Record (No. 600):

> "A. Well, in securing right-of-way, where we run through farms and cut farms up and destroy buildings or interfere with improvements, we have to pay more than the first cost of the land. If farm land is worth $25 an acre, we figure we would have to pay from two to four times (even more in some cases) than what the land is actually worth, to get our right-of-way; and for the purpose of making up the report to the state, we had a consultation with the right-of-way men of the various railroads in the state to see what percentage we would use; there were no two persons, hardly, that had the same idea of that percentage, because it varies so much in different parts of the country under certain conditions, so that it is very hard to make an absolute factor that will apply to all parts of a system or of a state; but after considerable discussion, we concluded that about three times would be reasonably fair for that purpose and adopted that in our case."

* * * * *

During the cross-examination, objection to a question was interposed resulting in a discussion which fully illustrated the position of all parties, including the witness. We quote the following portions. Vol. 2, pg. 191, G. N. Record (No. 600):

> "Q. Will you kindly make it plain, so that we will understand why, under your theory, if you are going to suppose that the railroad is eliminated, you shouldn't also suppose that all

of those conditions which have been produced by the existence of the railroad have also been eliminated in estimating the cost of reproduction?

Mr. Holden: If your Honor please, I think the point I made in my objection appears from this testimony. This is asking Mr. Hayden to support the theory which the lawyers have undertaken to support. Now, he was only asked to give his opinion as a real estate man as to what it would cost to rebuy these lands today, not twenty, thirty or more years ago. Now he is asked to say why it is not proper for you to assume conditions of thirty years ago. He is not responsible for that; he was not asked to perform any such service in making up these figures. It leads him into a realm that—I say it advisedly—he is not competent to testify upon, because he is not a lawyer and he has not studied the phases of this case that are embraced in any such consideration; and, if I may say it, I submit earnestly that this cross-examination ought to be limited to the basis upon which he puts himself on the stand; that is to say, that he believes that to rebuy this, that or the other piece of this real estate today, under existing conditions, would cost so much money. It seems to me that is the fair realm for his examination, not why he did not proceed to make up figures upon a different theory; he had no option in making up these figures, because the theory was put to him, and I submit that the question that was last asked indicates plainly the reason for this objection. He is asked to say why he didn't take a different theory."

* * * * *

Page 193-4:

"The Master: He simply says he was told to make up these figures upon a certain theory and he has done so. Now whether that is the proper theory or not, if it is the wrong theory the testimony goes for naught—

Mr. How: And we have no testimony.

The Master: —and you have no testimony, in that case.

Mr. How: Right.

The Master: But as to what his opinion may be as to whether that is the correct theory or not he has not been examined.

Attorney General Young: Your Honor, he testified that it is the correct cost of reproduction. He has testified, absolutely, that it is, in his opinion, and that he is a man of thirty years' experience.

The Master: He simply goes on and states exactly how that was made up, that he was told to make it up in a certain way. Now, if that theory is right, this testimony is competent; if that theory is wrong, the testimony is incompetent and it doesn't prove anything. I want to give you just as much latitude as possible. All parties have had a great deal of latitude in this case and I want to give you full latitude, but I really cannot see that this line is really cross-examination; he has not been asked as to whether that was a correct theory or not; he says, 'I made up these tables on a certain theory,' and whether it is right or wrong his opinion will be of very little use to any of us, he has not been asked as to whether it is the correct theory or not.

Attorney General Young: I apprehend, your Honor, that if we were to rest this case right now, as we would be strongly tempted to do, that we would find the Great Northern Railroad claiming that they had proved absolutely that this was not only the correct theory but the only theory. Now, we have a right to the question and counsel have no right to say—

The Master: I know, General, but you have got all the facts as to how that was made up and on what theory it was made up, and if it is the wrong theory they have got no testimony in the case on that point."

Again, page 252, same record:

"The Master: When you used the multiple, that was the basis upon which it was used, do I understand?

Witness: Yes, sir.

The Master: In other words, you determine in your own mind, from inquiry, what the value of the land was for purposes generally, not for railroad purposes, but generally, farming purposes or any purposes for which it was adapted, and that was the basis, and then whenever you did make use of the multiple it was upon that basis; is that right?

Witness: That is correct; yes, sir."

* * * * *

Again, page 253-4, same record:

"Q. And did you apply your multiple to the market value of the land with the improvements, or to the market value of the land without the improvements?

A. I think, to be entirely honest, we take that because we figure in this way: That where we have right-of-way running through a settled country where there are buildings and improvements, that those farms sell for a lump sum, which includes all those improvements. That makes a value per acre of that particular farm or that particular territory through which we are to run that right-of-way, and that is about the basis on which we would apply a multiple, either of three or whatever it happens to be.

Q. That is the basis upon which the multiple is applied?

A. Yes, sir; because there is no way that I know of to separate the value of improvements from the value of the land in any transfers or in any estimate of the property without going to a very considerable detail which would involve an enormous amount of time.

Q. And that plan is followed entirely regardless of the fact that those improvements

were all erected after the railroad was actually built and because of the railroad's existence.

A. Well, I simply took it as I found it on that date, whether they had been placed there because of the railroad or not."

* * * * *

The statements of the Master, which we have quoted, made by him during the taking of the testimony, are stronger than anything we could say, in support of our position that there was no testimony of value presented by the Complainants outside of estimates of cost of reproduction upon the false and misleading theories and assumptions indulged in by Complainants' witnesses.

The Minnesota lands of the Northern Pacific were subdivided in Exhibit 9-Cooper according to their location. The Master found separately as to the terminal lands in each of the large cities, St. Paul, Minneapolis and Duluth, and placed all other lands in one item.

PAGE BOUND VERTICAL IN BOOK

The following is a comparison in that form between Complainants' claims and the Master's findings:

Location.	Acres.	Exhibit 9 Cooper.	Findings.	% of Amt. Claimed.
St. Paul	751.68	$9,907,889.34	$8,356,080.94	84.3
Minneapolis	309.87	5,292,819.22	4,456,734.23	84.2
Duluth	600.91	5,155,203.75	4,503,054.28	87.1
All Other Land..	19,896.91	4,944,924.60	3,708,693.45	75.
Total	21,559.37	$25,300,836.91	$21,024,562.90	83.5

If these lands be placed in two general groups we have:

Location	Acres	Exhibit 9.	Findings.	%
Terminals	1663.86	$20,355,912.31	$17,315,869.45	85.6
Outside	19896.91	4,944,924.60	3,708,693.45	75.

EXHIBIT 9-COOPER INCLUDED LARGE ACREAGES WHICH CANNOT BE CONSIDERED IN ARRIVING AT FAIR VALUE UPON WHICH TO BASE RATES.

So far as can be determined from the testimony, all of the lands which were granted to the Northern Pacific by the Government for right-of-way are included in the item designated by the Master, "Lands Outside of Terminals." No reference to the method of acquisition was made in "Exhibit 9-Cooper," nor has the Master in any way segregated the granted lands from those purchased, and this notwithstanding the fact that counsel for the state demonstrated upon the cross-examination of Mr. Cooper that the segregation could be made (Defendant's Exhibit M-Cooper and M-1 Cooper, Vol. 9, N. P. Record).

We first call attention to Defendants' Exhibit M-1 Cooper (Vol. 9, Simpson v. Shepard, No. 599), purporting to give the area and valuations placed upon donated and purchased lands segregated by states. It was originally prepared at the direction of the Interstate Commerce Commission for the Spokane rate case and is as follows:

PAGE BOUND VERTICAL IN BOOK

DEFENDANTS' EXHIBIT M-1 COOPER (N. P.)

Statement Showing Total Area and Valuation of Right-of-Way and Terminal Grounds Northern Pacific Railway Company, Subdivided to Show Area Purchased and Valuation Thereof, and Area Donated and Valuation Thereof.

	TOTAL AREA.		AREA PURCHASED.		AREA DONATED.	
	Area.	Valuation.	Area.	Valuation.	Area.	Valuation.
Wisconsin	3,454.69	$1,966,639.00	2,919.33	$1,876,913.38	535.36	$89,725.62
Minnesota	21,532.83	24,805,933.96	12,136.34	21,210,946.66	9,396.49	3.594,987.30
North Dakota	31,831.76	10,353,506.00	11,965.95	3,218,227.00	19,865.81	7,135,279.00
Montana	51,454.97	7,049,709.00	9,782.85	3,139,791.75	41,672.12	3,909,917.00
Idaho	6,357.74	946,431.00	1,969.70	407,066.75	4,388.04	539,364.25
Washington	36,321.57	60,156,630.63	11,432.57	40,027,782.50	24,889.00	20,128,848.13
Oregon	756.72	648,612.00	756.72	648,612.00	None	None
Washington & Columbia River Railway	2,733.00	371,200.00	1,822.00	247,433.33	911.00	123,766.67
Port Townsend Southern Railway	461.16	75,204.00	461.16	75,204.00	None	None
Duluth Union Depot and Terminal Co.	6.94	420,625.00	6.94	420,625.00	None	None
Minnesota & International Ry. (N. P. 70% interest)	1,911.94	95,597.25	1,052.21	52,610.95	859.73	42,986.30
Totals	156,823.32	$106,890,087.84	54,305.77	$71,325,213.32	102,517.55	$35,564,874.52

The above statement has been compiled from the records of the Northern Pacific Railway Company; because of the long period of time since most of the property was acquired, and for other reasons, the records are incomplete, therefore the figures are to a limited extent an approximation, but are believed to be substantially correct.

St. Paul, Minnesota, April 9th, 1907.

For the purpose of showing the attitude of the parties to this litigation, we call attention to the proceedings leading up to the production of this statement found in Vol. 2, N. P. Record, (Simpson v. Shepard, No. 599), pages 428-436, inclusive, from which we quote the following, beginning on page 435:

"Q. Now, this paper which you say we have been 'making so much fuss about,' and which you say was made up by you, contains your valuations, or the values as fixed or estimated by you, of the terminal properties in use, or some of them, does it not?

A. I would like to answer that just a little bit differently and get the thing straight. I will read the heading of this paper, which tells just what it is. 'Statement showing—'

Mr. How: I don't think he wants you to.

Witness. 'Statement showing total area and valuations of right-of-way and terminal grounds Northern Pacific Railway Company, subdivided to show area purchased and valuations thereof, and area donated and valuation thereof' That is the heading of the paper, and what follows, of course, is the information.

Q. And that does show that some portions of these terminals referred to in Exhibit M were donated, does it not?

A. I have not segregated, in this paper, the terminal grounds, but undoubtedly some of the terminal grounds shown in Exhibit M are included in the area donated.

Q. And that undoubtedly—

A. No, I want to correct that, I want to change that answer. Upon further reflection, I am not at all sure that any of the terminal grounds were donated. I think the area donated on this statement is all or substantially all right-of-way. I cannot recall, from memory now, any donation having been made of

POOR COPY

terminal grounds, but I am talking now from memory only.

Q. And you may be mistaken about that?

A. Being human, yes.

Q. Now, as to the right-of-way in that statement, donated, did you include that which had been donated by the government under the grant, or by private individuals?

A. I included all right-of-way which was donated to us from any source; that is to say, all right-of-way for which we did not pay actual money or some other consideration.

Q. And that exhibit shows your estimate of the value of that, does it not?

A. Yes, sir."

Previous to this and during a controversy as to whether or not Exhibit M-1, Cooper should be produced, Mr. Cooper, referring to it, said, page 433:

"Q Is it not true, Mr. Cooper, that this paper to which we have referred and which was fastened together with this Exhibit M when you handed it to me, purports, upon the face of it, to show that certain portions of these terminal properties were donated to the Railroad Company?

A. The paper that you are talking so much about and having so much fuss about was a statement that I prepared, at the request of Commissioner Prouty, in the Spokane rate case. He told me to prepare several statements; one of those statements is Exhibit M; the one we are talking about is still another statement, complete in itself, and, while on the same general subject, has no connection with Exhibit M."

It will be observed that the statement, Defendants' Exhibit M-1 Cooper covers the entire Northern Pacific System, but the lands in each state are

segregated. The lands donated in Minnesota amounted to 9,396.49 acres, of which the value claimed was $3,594,987.30. Complainants' Exhibit 9-Cooper, prepared for this case some time later, gave a total acreage of lands in Minnesota excluding the Twin Cities and Duluth as 19,869.91 for which a reproduction cost was claimed of $4,944,-924.60.

Not only was there no testimony showing how the donated land was used, what portion was within the limits of towns and villages and what portion through purely agricultural lands but a request for that information was practically refused.

The following testimony was given by Mr. Cooper, Vol. 2, pg. 202, N. P. Record (No. 599):

> "Q. How much of the right-of-way in Minnesota, outside of St. Paul, Duluth and Minneapolis, if you know, the cost of purchasing which you have estimated in this Exhibit 9, was purchased by the Northern Pacific, and how much of it was granted to it or given to it by the government?
>
> Mr. How: That is objected to as immaterial, and not proper cross-examination; it has not anything to do with the topic of this witness' testimony.
>
> The Master: Objection noted.
>
> A. I could not answer that without going through our records."

The attitude of counsel and witness demonstrates an intention to conceal basic facts. If we endeavor to compute what outside lands were paid for, to use Mr. Cooper's language by "actual money or some other consideration," we have:

POOR COPY

	Acres.	Reproduction Cost.
Total Ex. 9-Cooper	19,896.91	$4,944,924.60
Donated Ex. M-1 Cooper.	9,396.49	3,594,987.30

Reproduction cost of land purchased or condemned $1,349,937.30

The Master allowed for reproduction cost:
Lands Outside of Terminals $3,708,693.45
Vol. 1, pg. 220, N. P. Record (No. 599).

To the extent therefore of the reproduction cost of at least 9,396.49 acres granted by the United States to the Northern Pacific to be used by it as a right-of-way, and of an assigned value which there is no means of determining, this finding includes and is based upon the conclusion that the carrier is entitled to earn a return upon the reproduction cost of the land in which it has an easement or limited fee for the purpose of right-of-way, and which right was conferred upon it by the Government without cost.

It is proper now to determine the nature of this right.

TITLE OF CARRIER IN GRANTED RIGHT-OF-WAY.

By the Act of Congress, approved July 2, 1864, 13 Stat. 367, creating the original company, it was provided:

> "SECTION 2. AND BE IT FURTHER ENACTED. That the right-of-way through the public lands be, and the same is hereby granted to said

POOR C

'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction, hereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad, where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations; and the right-of-way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operations of this Act, and acquired in the donation to the [road] named in this bill."

This grant was considered by this Court in Northern Pacific Ry. Co. v. Townsend, 190 U. S. 267. It was held:

"In effect the grant was of a limited fee, made on an implied condition of reverter in event that the company ceased to use or retain the land for the purpose for which it was granted."

Again:

"To repeat, the right-of-way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed. * * *"

A property right of this character is no different, when the inquiry is to ascertain the fair value upon which to predicate rates, than the right which a street railway company has to use the

R COPY

streets of a muncipality, or, that which a lighting company acquires, to lay its mains beneath the surface of a public street. It is a privilege or franchise, granted to a public service corporation, to enable it to make its investment available and profitable. But the return, or what is a fair profit must be computed upon the actual investment. Whether such investment is to be taken at its original amount, or, at the present value of the property invested in, is another question, but to the fair value of the investment, so determined, there cannot be added an additional sum, to represent the value of the rights or privileges, granted solely for the purpose of making the amount contributed by private individuals safe and reasonably remunerative.

Taken thus, the public, the original owner of the right, receives full value, as the use granted enables the corporation engaged in the public service to perform its duties economically; the grantee receives an equal benefit, as the grant makes its other assets remunerative and enables it to secure, without resorting to excessive charges, an ample return upon the property which *it* devotes to the service.

This is what we understand to be the holding of this Court in the Willcox case (212 U. S. 19).

In thus allowing as part, of the corporate property the "reproduction cost" of the right-of-way, in the case of the Northern Pacific 400 ft. wide, the Master does not seem to have realized he was including in the inventory a franchise granted to the company. Thus he said (Vol. 1, page 243, N. P. Record, No. 599):

> "Good-will and corporate franchises are not proper elements of such valuation" (reproduction cost). "Patronage and good-will of the public are its contributions to the success of the enterprise, for which it is not to be assessed. Corporate franchises are the free gifts of the Government conferred upon any organization willing to embark in such undertaking. * * *"

Yet he included this franchise, right-of-way, as land, and valued it at 225 per cent of the market value of contiguous lands. To use the Master's own language, Vol. 1, page 224, N. P. Record (No. 599):

> "* * * That is, the market value of adjacent lands has been ascertained and applied to the right-of-way lands and such value multiplied by three to ascertain what it would cost a railroad company to acquire the property. * * *"

And

> "Upon careful consideration of the evidence and all the circumstances thereby disclosed bearing on the question, seventy-five per cent of the valuations as fixed by Complainants' witnesses has been determined upon as the fair reproduction value of the property in the Northern Pacific and Great Northern cases."

Seventy-five per cent of three times market value is 225 per cent of market value.

Even if the right-of-way lands should properly be included in the inventory, the Circuit Court erred in describing this method as finding "the real value."

COPY

LANDS ACQUIRED BY CONDEMNATION.

We have already stated our reasons for claiming, that, where an easement in lands has been acquired by the exercise of the power of eminent domain conferred upon a corporation to enable it to perform, for the state, a governmental function, the easement or right, so acquired, cannot be viewed as ordinary property capable of being used for any purpose its possessor may desire, and, therefore, subject to the laws of supply and demand and available for barter and sale.

The corporation has, by the expenditure or investment of a certain sum, secured the exclusive use of certain lands for one definite purpose. The use or right was acquired through the special power conferred upon the corporation, the state's contribution, and the expenditure of a definite sum by the corporation, its contribution. When the question of a reasonable return, arises between the state and the corporation, the computation, it seems clear, must be based upon an amount which at least it no more than the actual sum invested by the corporation.

There is perhaps one qualification to this statement. If the entire investment, or, sacrifice of the owners, were taken as the base, it might, as suggested by the Interstate Commerce Commission, be proper to add something for the years, if any, during which the venture was unremunerative.

No attempt was made to show, how much, or, which of the lands, included in the inventories of any of these companies, was acquired by condemnation or the price paid therefor.

POOR

Land Purchased for Future Use Should Not Have Been Included.

The Master allowed for land not used for transportation, but which had been purchased, it was claimed, in anticipation of the future needs of the carriers. These lands were in the three large cities and valued as terminal properties. The area of such lands belonging to the Northern Pacific, but, without a particular description of their location, was contained in the statement we have referred to, "Defendants' Exhibit M-Cooper."

We give it in full:

OR COPY

DEFENDANTS' EXHIBIT M, COOPER. (N. P.)

Statement showing Total Area of the following Terminal Properties of the Northern Pacific Railway Company, sub-divided to show quantity now used by Railway Company, quantity uesd by others, and quantity not in use.

Terminal.	Total Area Acres.	Used by Ry. Co. Acres.	Used by Others Acres.	Not Used Acres.
Superior	982.62	594.46	85.67	302.49
Duluth	600.91	405.83	94.42	100.66
Duluth Union Depot & Ter. Co.	6.94	6.94	.....	.....
St. Paul	676.97	296.57	202.00	178.40
Minneapolis	284.61	191.98	18.05	74.58
Spokane	422.31	286.55	16.66	119.10
Tacoma	680.84	456.93	46.94	176.97
Seattle	461.03	368.33	18.40	74.30
Butte	223.76	213.23	10.53	.....
Everett	124.68	59.23	12.85	52.60
Bellingham	67.86	51.72	1.14	15.00
South Bend	35.63	25.82	9.81	.....
Aberdeen and Hoquiam	69.83	69.76	.07	.....
	4,637.99	3,027.35	516.54	1,094.10

The above statement is compiled from the records of the Northern Pacific Railway Company, and is substantially correct; the area used by others is leased under terms which permit of cancellation of the leases on not exceeding one year's notice if required for railroad purposes; the area used by others and the area not used, was all purchased and is held for terminal purposes, and will be required for such within a reasonable period of time.

THOMAS COOPER.

St. Paul, Minnesota, April 9th, 1907.

PAGE BOUND VERTICAL IN BOOK

This exhibit was described by Mr. Cooper, as follows, Vol. 2, pg. 427, N. P. Record (No. 599):

> 'A. I think it would make it clearer if you put it this way: that this statement is segregated to show the area in each terminal used by the Railway Company for railway purposes; the area used by other parties than the Railway Company (which means property we have leased to others and is in use by them for the time being); then again, property that is not used by the Railway Company or anyone else, that is lying idle; the three together making the total area that we owned at that time."

The exhibit gives this information for the entire system. We only desire to call attention to the Minnesota land so unused which is shown by the second to the fifth items, inclusive, of the exhibit. The result is as follows:

Total area in Minnesota Terminals, of which there was	1,569.43	acres,
Used by Others than Railway Co.,	314.47	acres.
Unused	353.64	acres.
Total Not Devoted to Transportation	668.11	acres,

which is 42% of the total area of lands in terminals valued and allowed by the Master. The total area in Minnesota Terminals claimed in Ex. 9-Cooper was 1,663.46 acres, the difference being on account of lands purchased after the trial of the Spokane Case and presumably the newly acquired lands should be included in lands not used.

Mr. Elliott was questioned concerning these unused lands and testified generally as to such lands

over the entire system. He therefore gave the unused acreage as 1,600, Vol. 4, pg. 1231, N. P. Record (No. 599):

> "Q. Does any of this 1,600 acres comprehend property which you have designed for the use of the Railway Company, but which has not been wholly acquired as yet?
>
> A. Some of it does, yes.
>
> Q. How far ahead have you looked in your purchase of such property; that is, in how near to the future, have you, when you bought the property or had it bought, intended to employ it for development?
>
> A. Well, in some cases I thought it would be five years before we would utilize it, in others ten or maybe fifteen."

It is barely possible that we could by an exhaustive examination of the detail prices testified to ascertain just how much of the value found for terminal lands by the Master, represented this unused acreage. We have not attempted to do so and feel justified in assuming the value found bore the same relation to the total sum allowed for terminals as did the area, that is forty-two per cent. It cannot in any event be claimed to be less than a very large part of the aggregate value.

If the carrier is to be thus permitted to speculate in land at the expense of the public, a new field of industry has undoubtedly been developed.

It was not attempted to disguise the fact that the land values claimed and allowed were vastly greater than original cost. Upon this enhanced value the Master found the carrier entitled to earn 7 per cent annually. The carrier may then buy any land having any prospective utility for railroad

purposes, compel the public to pay transportation charges, allowing a return at that rate for an indefinite number of years, upon a fanciful reproduction value of the property.

If a competitor threatened to enter a city all the available land might be purchased by a rival, already in. The price paid would be immaterial as the reproduction cost would exceed such price in any event and under the decision in these cases a handsome return is secured.

The fact that the rentals received from the portion of the lands leased were accounted for as earnings does not affect our position in this respect. It may be that such rentals should be excluded as are the proceeds from land sales, operation of coal properties and other activities not connected with transportation.

This, to us, is another instance of the entire disregard, shown by the Master, for adjudicated cases, which differed from his personal views.

In the Willcox case, as we have already pointed out, the Master included, in the inventory lands of this character. Judge Hough, in reviewing the Master's report, excluded them. This Court reduced the total amount found by Judge Hough, disallowing portions of the items he included. In finding the proper amount to be as thus reduced, without any additions for items rejected by the Circuit Court, this Court, in effect affirmed the holding of Judge Hough, excluding from the inventory, property not then actually used for public purposes.

The Master allowed in the Northern Pacific Case:

Total value of terminals $17,315,869.45. 42% of which is $7,272,665.16.

The total cost of these terminals was, as given by Mr. Cooper, Vol. 7, pg. 3079, N. P. Record (599): $4,527,228.76. 42% of which is $1,901,436.07.

The Inventory Should Not Have Included Area in Public Streets.

This item is the area of public streets in Municipalities included as land owned by the company; the reproduction cost of which, although no amount is separately stated, was included by the Master.

Not only are many streets in cities crossed by the railway, but many others are longitudinally occupied under some form of grant from the Municipality. The findings do not show the area of the streets thus occupied nor the value allowed as the cost of reproduction. The Master said, Vol. 1, pg. 224, N. P. Record (Simpson v. Shepard, 599):

> "No deduction has been made for street crossings or parts of streets used for right-of-way held under rights acquired from the respective city authorities without acquisition of the fee. For railroad purposes these rights are substantially as valuable as if held under absolute title. They are permanent in character and in case of reproduction would cost practically as much as private property."

This item having been questioned by the witnesses for the State, Mr. Cooper produced "Com-

plainants' Exhibit 78-Cooper," to show that some amounts had actually been paid in the City of Minneapolis to abutting property owners. This, as an item of original cost, was entirely proper, but when counsel for the State attempted to ascertain how much was claimed on account of such rights in the "reproduction" estimates the usual evasion was met with.

The following occurred at the time Mr. Cooper presented his Exhibit 78 (Vol. 7, p. 3077, N. P. Record, No. 599):

> "Mr. O'Brien: You mean the right-of-way in the street?
>
> Witness: The right-of-way in the street. And the purpose of this statement was to show the company actually paid a substantial sum of money for the right to occupy these streets.
>
> Mr. O'Brien: What was the aggregate value, as claimed by you?
>
> Witness: I couldn't say; I have not attempted to figure that out."

It would require an extensive examination of details to show the exact amount thus erroneously added to the ultimate "value" found and how much it exceeded the investment as given by Mr. Cooper. Suffice it to say it was a substantial amount and its inclusion shows the impropriety of the method adopted.

THERE WAS NO EVIDENCE BY COMPLAINANTS OF MARKET VALUE OR ACTUAL VALUE OF TERMINAL LANDS.

The Master having found only reproduction cost it is perhaps unnecessary that we should go farther and show there was no evidence except that of Mr. Morgan, whose testimony the Court rejected in toto, of actual market value of the terminal lands.

It may be claimed, however, that inasmuch as the Master stated he based the cost of reproduction of terminal lands upon the testimony of certain real estate dealers, three in each city, that the base so taken amounts to a finding of the market value in that amount.

It is not difficult to give a definition of what is meant by the true, or normal, or market value of an article, whether of real or personal property. They are practically synonymous terms, meaning the worth upon the market of an article which is for sale by a merchant capable of selling to the best advantage to a purchaser able and willing, but not compelled to buy. The question propounded to Mr. Cooper appearing at page 3080, (Vol. 7, N. P. Record No. 599), was framed upon the definition Courts have given of market value:

> "Q. Now, if what you are endeavoring to arrive at was the market value of the real estate not exclusive for any one purpose but simply giving it its best value for the purpose for which it is best adapted, to be purchased by a purchaser who is willing to buy, but not compelled to buy, and to be purchased from an owner who is willing to sell, but not

compelled to sell, entirely different methods would have to be used, would they not?

A. Yes.

Q. And an entirely different conclusion would be necessarily arrived at as to value?

A. I think that is correct; I think that would follow."

The above question was entirely fair and included every element going to make up market value.

Lewis on Eminent Domain (3rd Ed.), sec. 706.

Stinson v. St. Paul and Minneapolis Ry. Co., 27 Minn. 284.

King v. Minneapolis Union Ry. Co., 32 Minn. 224.

Miss. and Rum River Boom Co. v. Patterson, 98 U. S. 403.

In the Boom case this Court said, page 407:

> "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties."

No one will dispute that in finding present market value, the availability of land for terminals, if it is so available, in a large city must be taken into consideration. Nearly every witness, however, with perhaps some few exceptions, went beyond this and gave an additional value to the land because it was owned and used by a railroad company, and this, the witnesses and the Master, describe as railroad value, which, with the addition of amounts for consequential damages, the Court says was fixed by the Master at 30% above the normal value.

This so-called railroad value, as distinguished from market value, was arrived at partially by the appraisers assuming the necessity of the present purchase of the entire tract by the company, which alone destroys the appraisal as it is directly opposed to the principle that the property is to be valued as though offered for sale by one who desires, but, is not obliged to sell, and, bought by one who is under no necesity to do so.

Lewis on Eminent Domain (3rd Ed.), page 706.

It was also assumed by most of the appraisers that the identical tract would be purchased so as to constitute one continuous acreage; in other words from the beginning of the appraisement by the real estate men employed by the companies, up to and until the Master's findings, the necessity for presently acquiring the identical land by the company, now holding it, was never lost sight of. This assumption was taken to support higher values. Thus in the Great Northern case, Vol. 2, page 377, G. N. Record (No. 600) Mr. Taylor, one of the appraisers, testified:

"Q. I understood you to say that railway property for terminals and right-of-way, occupies a class of its own?

A. Yes, it is not to be compared with ordinary isolated pieces of real estate.

Q. Why shouldn't you compare a right-of-way or a terminal occupied for railway purposes with adjacent property?

A. In the first place, it is put to a different use; the value as based on that use is different. In the second place, it becomes an entire and completed creation; it ceases to be a commodity

that is offered in the general market; it is not dependent on the little fluctuations, the temporary stringency of money, the individual necessity of sale, and the various elements that go to make the prices of real estate viewed as an ordinary salable commodity.

Q. Then would you not expect the railroad property to follow the fluctuations of property immediately adjacent to it?

A. Not to any appreciable extent."

Again, at page 380:

"Q. And your theory and your claim upon this point is very interesting, and you are much nearer the solution of it possibly than any of us realize. You absolutely reject the idea that railroad right-of-way is to be valued upon the same bases as contiguous property?

A. I reject it wholly.

Q. Reject it wholly?

A. I have ever since I have made any study of the situation."

Mr. Read, at page 610, Vol. 2, Great Northern Record No. 600, after denying that any amount was added to the value because of their use, said:

"Q. The difficulties under which a railroad company or any other large purchaser labors, endeavoring to bring into one tract of land several different tracts, were known to you at the time that you made this valuation?

A. Yes, sir.

Q. And that condition was fully considered by you?

A. It was."

Mr. Cooper, in his testimony, described the original employment of these gentlemen. Their employment to value terminal lands in their respective communities was agreed upon by all the railway companies and they entered upon the work of a general appraisal.

OOR COPY

Mr. Cooper said, Vol. 2, pg. 442, N. P. Record (No. 599):

"Q. But with that explanation I will ask this further question: Was there any agreement between the representatives of the railroad companies, or any concert of action, by which they selected the same real estate men to value their properties in the City of St. Paul?

A. The representatives of the different railroads having in charge the matter of making up the valuation of the right-of-way and terminal grounds for the State, had a meeting at my office, and the suggestion was there made that we employ three experts, in each of the three large cities, St. Paul, Minneapolis and Duluth, to value all of our properties; and that was agreed to by all of the roads excepting the Milwaukee Company, which already had its valuation made. We then discussed who the three real estate men would be in each city, and the gentlemen were selected in that way,—for St. Paul, Messrs. Watson, Taylor and Read. Each company was entirely free to use the expert's figures or not, as they saw fit, or to modify them, nobody obligating themselves in the matter at all. We simply wanted to get the information in that way, and it was deemed best that we should employ the same men, because the valuable part of the railroad property in St. Paul is that which lies between Sixth street and the river and below Sibley street; and that is owned by the Milwaukee Company, the Union Depot Company, the Great Northern, the Omaha and the Northern Pacific, all side by side; therefore, the same men could do the work for all of the different companies to better advantage than if each company hired a single man or more men to go over for itself; also it was more economical to do it in that way; the expense of the three experts was divided among all of the companies in proportion to the amount of the property

POOR

that was valued for them. But, as I say, no company was under any obligation to use those figures."

* * * * *

These appraisers made reports embodying valuations of the land per square foot. In Northern Pacific case the report as to St. Paul terminals is given in Complainants' Exhibit 30-Cooper (Vol. 9, Case No. 599).

Similar reports were made by the appraisers in the other cities and to the other companies. With the exception of the appraisers appointed in Duluth, the valuations so made and reported were not estimates of market or ordinary normal value, but what the Court found to be railroad value to which there was then added a percentage for what was designated "severance damage and cost of acquisition" the final amount being reproduction cost.

Mr. Taylor, one of the St. Paul appraisers, said, Vol. 4, pg. 1431 N. P. Record (No. 599):

'Q. Of course, in the last analysis, the market value of property is made up from a consideration of what the property will sell for upon the market?

A. Well, not quite, as applied to railroad terminals; my criterion of value is what it would cost to duplicate the property."

Mr. Read, another of the St. Paul appraisers, said, Vol. 4, pg. 1143, N. P. Record (No. 599):

"Q. But you did proceed on the theory that the prices you fixed would be as large as a railroad company would have to pay in acquiring them?

A. Yes, we thought the price would be rea-

OPY

sonably what they or anybody else would have to pay.

Q. But you figured that anybody else would have to pay just as much as a railroad company; that was the basis on which you proceeded?

A. Yes, anybody gathering together that body of land, we figured that that was about what it would cost them.

Q. And you put it at a higher price than the ordinary market value of land sold in isolated tracts?

A. We did, yes."

The Master found, Vol. 1, pg. 222, N. P. Record (No. 599):

"The Master is of the opinion that the appraisers of the St. Paul and Minneapolis terminals were fully impressed with their value for railroad purposes and their appraisement, as verified by them before the Master and as modified in the Northern Pacific case, is a generous valuation and should be accepted as full railroad value of the terminal properties and has been by him so accepted with an addition of five per cent to cover cost of acquisition and consequential damages, and which seems ample for the purpose in the large cities. The peculiar location of the properties did not seem to require a large increase on this account.

In Duluth, the appraisers were much more moderate in fixing values and seemed to have adjusted the same with reference to the adaptability of the property for general business enterprises and not to have taken into consideration their special and increased value for railroad purposes. It is determined that their appraisement, increased by twenty-five per cent thereof, all things considered, will fairly cover reproduction cost, and their valuation is fixed at such sum accordingly. * * *"

The learned Circuit Judge in affirming the Master, said, Vol. 1, pg. 421, N. P. Record (No. 599):

> "The Master in effect found that the cost of reproduction and the present value of the lands for the terminals in the three great cities, including therein all cost of acquisition, consequential damages, and value for railroad use which he allowed, was only about 30 per cent more than the normal value of the lands in sales between private parties."

We have, then, this situation as to the terminals, the most important single item in the inventory. Over forty per cent of the area included was not used for transportation purposes, but in spite of this there was taken as the fair basis upon which to predicate rates, the reproduction cost of all the lands, an amount which the Court finds to be thirty per cent more than normal value.

Without questioning a single finding of fact or disputing any testimony of the Complainants' witnesses, we submit the Reproduction Cost allowed for the Northern Pacific terminal lands exceeded the present value of lands devoted to transportation in the terminals of that company as follows:

Reproduction Cost, Master	$17,315,869.45
Erroneously included 42%	7,272,665.16
Reproduction Cost of Lands Used..	$10,043,204.29

This is said by the Court to be 30% above normal value. Present normal value of the terminal lands devoted to transportation, therefore, $7,725,541.76.

The total cost of the Northern Pacific Terminals, many of the lands quite recently purchased and including those purchased for future use was only

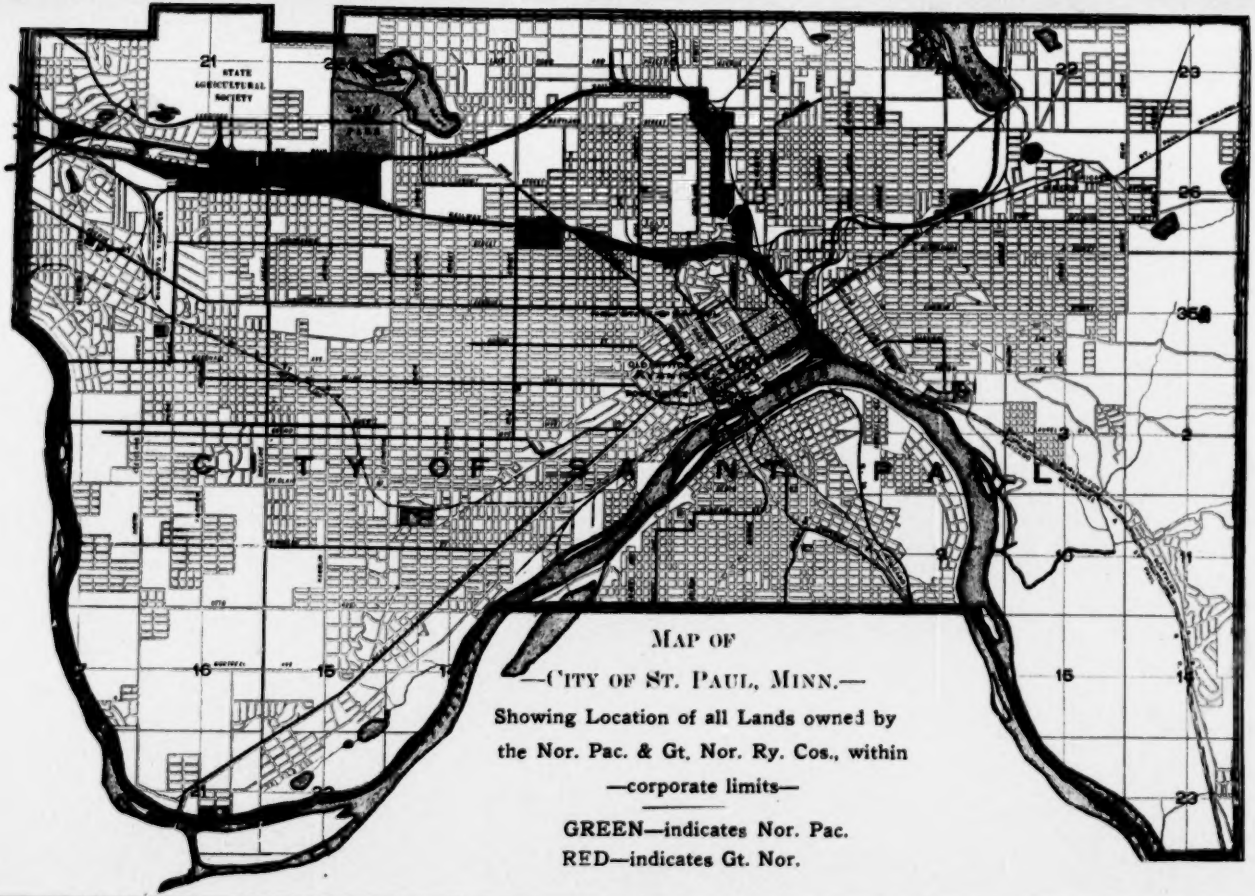
R COPY

$4,527,228.27. Cooper, Vol. 7, pg. 3078-9, N. P. Record (No. 599):

In this finding of the Court that the Master allowed value of the lands in sales between private parties "only about 30% more than of the normal value of the lands in sales between private parties" be compared with the language of this Court in the Boom Company case, to-wit: "In determining the value of land appropriated for public purposes the same considerations are to be regarded as in a sale of property between private parties," it will be seen how far the finding was from being that of market value.

The Master seems to have first accepted the valuation of the appraisers as his basis upon which to compute reproduction cost, but in his discussion of the subject, discredits their assumptions and methods and thus destroys the value of their testimony. He then, by following Mr. Cooper in his modification of their valuations in the Northern Pacific case and following Mr. Hayden in accepting their valuations in the Great Northern case and finally by increasing the valuations of the Duluth appraisers, entirely discredited each appraisement made by the real estate experts.

To illustrate that there was no justification for accepting the appraisement of these three gentlemen in the Great Northern case and rejecting it by following Mr. Cooper's modifications in the Northern Pacific case, we give upon the following page a map of the City of St. Paul in which the lands of these two companies are shown and which establishes the correctness of Mr. Cooper's testimoney that the lands practically were side by side and that one set of appraisers would be sufficient to value each.



MAP OF

—CITY OF ST. PAUL, MINN.—

Showing Location of all Lands owned by the Nor. Pac. & Gt. Nor. Ry. Cos., within

—corporate limits—

GREEN—indicates Nor. Pac.

RED—indicates Gt. Nor.

All of these considerations fully establish our claim that the Master accepted and followed the testimony of Mr. Cooper and Mr. Hayden to the exclusion of the testimony of any other person. Even if the appraisers had made their valuations upon a proper conception of what constitutes market value, the Master's findings in this case do not depend upon their testimony; the values found are not the market value of the lands, but are what is called reproduction cost, based entirely upon the theory, testimony and assumptions of Mr. Cooper and Mr. Hayden.

The Method Illustrated as Applied to Great Northern.

A remarkable illustration of the result of this method is found in the Great Northern record. Counsel for the state had demanded that Mr. Hayden produce a statement of the original cost of the right-of-way of that company. (Vol. 2, page 297, et seq. Great Northern Record, No. 600.) This, it was stated, could not be furnished, but the following stipulation was made (Vol. 3, page 1353, Great Northern Record):

> "For the purposes of this suit, it is stipulated, that between the dates of the acquisition by the Great Northern Railway Company or its predecessors in interest of the right-of-way and terminal grounds of said railway located within the State of Minnesota, and June 30, 1908, market values of real property generally located in the vicinity of said right-of-way and terminals, increased not less than four times upon an average. Also that the average mar-

POOR COPY

ket values for general purposes of the real estate forming such right-of-way and terminal grounds did not at the times of the acquisition thereof by the railway, exceed the average market values at the same time of the adjacent real estate."

If we now apply this statement of fact to the findings of the Master with reference to the cost of reproducing lands, outside of terminals, we have as a result that while lands contiguous to the right-of-way increased in value 400%, the right-of-way lands increased 900%. The reproduction cost of the right-of-way lands being found to be 2¼ times the present market value of contiguous lands.

If this computation were continued, the same percentage of difference would, of course, also continue.

The result is, that, although, as already said, when a railroad company takes private lands for public purposes, the value of the land appropriated is to be determined by the same considerations as in the sale of property between private parties, this Court is now asked to say that when the value of that same land is to be found, as a basis for the compensation to the carrier for its use, it is to be taken at 2¼ times the value it would have in the hands of private parties.

Other Evidence of Over-valuation.

Complete and convincing evidence of gross over-valuations was furnished by Mr. Morgan when he testified in the Great Northern case. Defendants'

POOR

Exhibit "C-8" Morgan Corrected, Vol. 5, Great Northern Record (No. 600).

The statement contains a list of all land purchased in the cities of St Paul and Minneapolis since 1901, the price at which the purchases were made and the reproduction cost of the same lands as claimed in the inventories of the companies as reported by them to the State, when these valuations were entered upon. Mr. Morgan's explanation of this exhibit will be found at Vol. 3, p. 1368, G. N. Record, No. 600.

* * * * *

The total area thus purchased as shown in the corrected exhibit was 397.27 acres at a cost of $3,069,239.73. Reproduction cost claimed, $10,104,831.28.

If reproduction cost were to be again estimated today, the amounts claimed would, of course, show a corresponding rate of progression.

It will be remembered that the same appraisers were employed by all the railway companies and that the Master, as we have already pointed out in a tabulation, only reduced the claim of the Northern Pacific less than 16%. If this Court will examine this Exhibit "C-8" Morgan, it will observe that the increase claimed by the Great Northern and Northern Pacific Companies is generally greater than in the cases of the other companies, so that for the purpose of these cases, the showing is entirely fair.

We particularly desire to call attention to the first item appearing upon this exhibit.

COPY

The Chicago, Rock Island and Pacific Railway Company had entered the City of St. Paul and secured its right-of-way and lands in that city during the years 1901-2. When the railways employed the real estate experts to value their lands in 1906 these lands were included, valued by the same experts and an inventory and claim of value transmitted to the Railroad and Warehouse Commission by the Rock Island Company.

The showing as to these lands which were recently acquired under all the distressing conditions described by the witnesses in imagining reproduction cost is as follows:

Actual cost, 1901-2.....	$137,298.55
Reproduction cost, 1906	978,262.69

COMPARISON OF REPRODUCTION COST WITH ORDINARY VALUE.

Another statement, introduced by defendants, shows the appalling exaggeration claimed in the reproduction cost of terminal properties.

The railroad lands in St. Paul are found in almost, if not quite every, section of the city, and taken together are representative of every class therein. To show this we herewith present a map of the City of St. Paul accurately scaled and showing the location of the railroad lands. In connection with this map, we call attention to Defendants' Exhibit 3-T Morgan, Vol. 9, Northern Pacific Record (No. 599), from which we quote, referring to the City of St. Paul, the following:

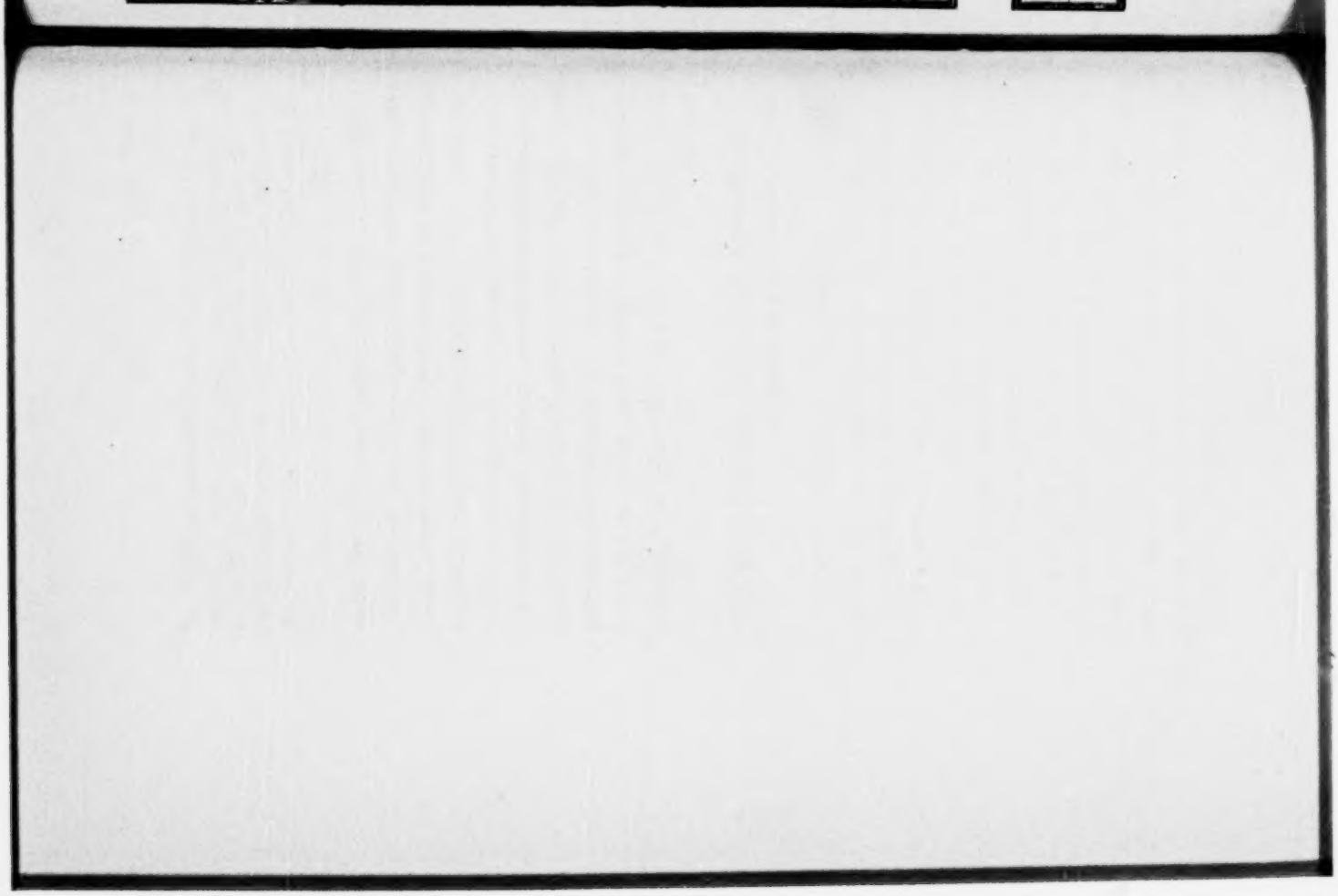
POOR C

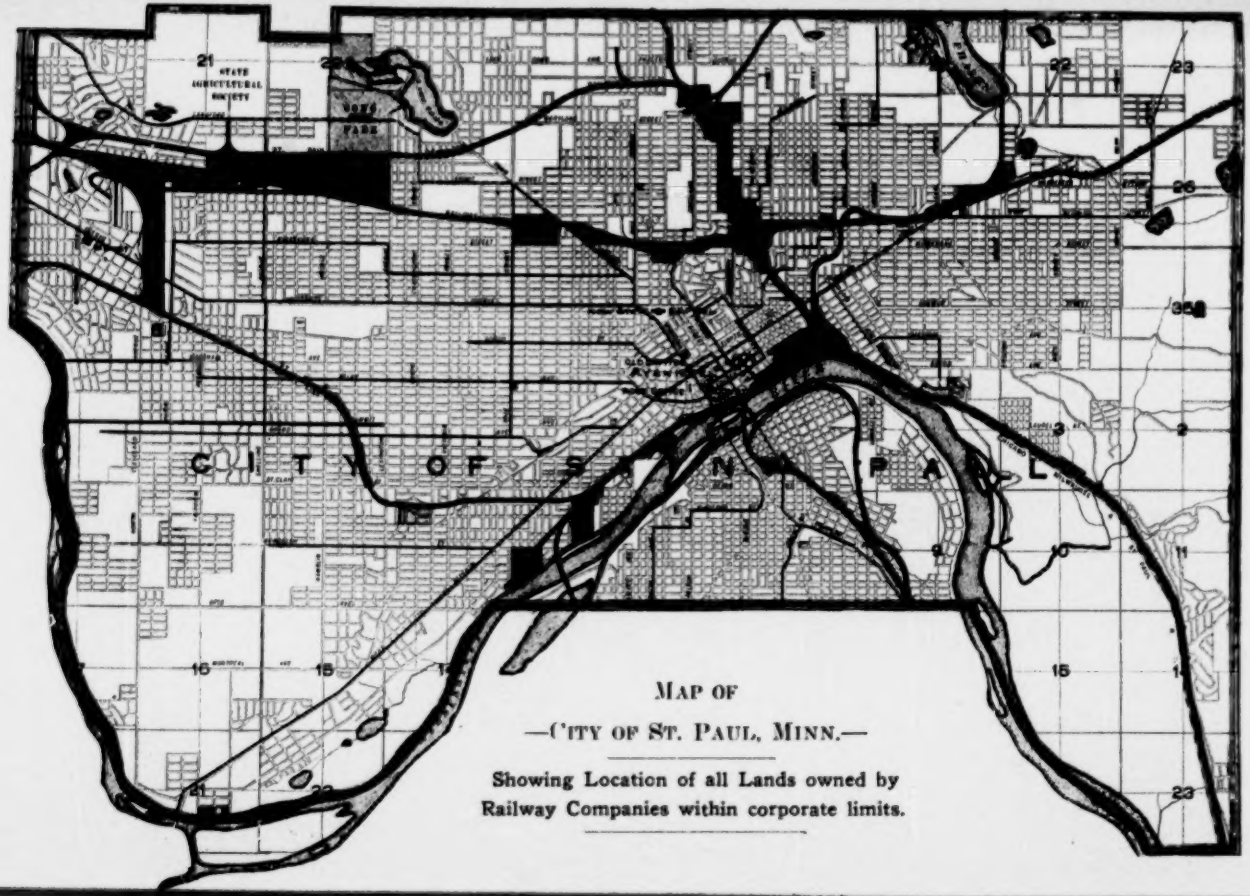
> "RAILROADS own the equivalent of 8½% of Assessed Area, on which they place a Reproduction Cost of $39,039,360.88, which R. C. is equivalent to 48.2% of the true value of all the 22,588 acres assessed in the City of St. Paul."

We should, perhaps, explain here what Mr. Morgan meant by "true value." He had, he testified, ascertained that lands in St. Paul, all taxed lands included, were assessed upon the average at 60% of their true or selling value. Having, then, the tota' assesed value of all lands taxed in the city he took such amount as 60% of the true value and made his comparison between the claimed reproduction cost of railroad and this true value of all taxed land. (Morgan, Vol. 5, pp. 1798-1803, N. P. Record, No. 599.)

The Minneapolis situation as shown by this exhibit is practically the same.

R COPY





MAP OF

—CITY OF ST. PAUL, MINN.—

Showing Location of all Lands owned by
Railway Companies within corporate limits.

THE COST OF REPRODUCTION OF INVENTORIED PROPERTY OTHER THAN LANDS.

To distinguish all the property other than lands, we ask to be allowed, inasmuch as such property includes buildings, constructed roadway and every kind of equipment, to refer to it all as Construction."

The amounts found by the Master were arrived at by the use of excessive unit prices, and purely imaginary items, adopted because of the assumption of reproduction. Thus making, as in the case of lands, the assumption itself an element of value.

The findings as to these items were based upon the testimony of civil engineers called by Complainants. In no instance did any of the gentlemen testify to value, but only to reproduction cost, and as we have said, increased at least in some instances the unit prices of material, labor, etc., over actual prices, upon the ground that the immediate demand to be created by the construction would "stiffen" or increase prices.

Ordinarily, there would be little room for a dispute as to the cost of steel rails, ties, labor, cars, locomotives and all items other than land contained in an inventory. They are constantly upon the market and their present value can be easily computed. This has resulted in the use of the term "reproduction" or "inventory cost," and although incomplete when used alone, properly applied there can be no objection to the use of the method as of assistance in determining the present value of a particular item.

The method is based upon the Axiom: "Things equal to the same thing are equal to each other." Therefore, in finding the value of a given article, it is undoubtedly proper to consider the price upon the market of a similar article or one equally as useful and available.

It is not at all necessary to assume the reproduction of the article; the term is a colloquialism convenient in expressing the idea that the value of a given article, at a particular time, can be arrived at by considering, amongst other matters, the market, or going price of a similar article. If, therefore, the assumption itself, which has no basis in fact, is used to predicate other additional assumptions, or used as an element of value or cost in itself, it becomes worse than valueless; it necessarily leads to a false result.

In each case an estimate was made by the engineers as to the length of time which would be required to reconstruct the system, the prices which would result from the inauguration of construction work of such magnitude and to the aggregate amount obtained from the use of unit prices so derived, were added percentages for engineering and legal expenses, contingencies to be encountered and interest to be paid on borrowed capital, during this imaginary construction.

The first witness produced upon the trial of these cases was Mr. Darling, Chief Engineer of the Northern Pacific Railway Company. He presented two exhibits, the first showing the cost of reproducing the entire system (Ex. 2, Darling) and the second

POOR

the cost of reproducing the system in Minnesota. (Ex. 3, Darling.) We give the following extracts from his testimony. Darling (Vol. 2, pg. 7, N. P. Record (No. 599):

"Q. Have you prepared a statement of the cost of reconstructing the Northern Pacific System at the present time?

A. I have, as of the date of April 30, 1908.

Q. Will you produce that?"

(Paper produced and marked Complainants' Exhibit 2.)

P. 10, same record:

"Q. That is your estimate, based upon what prices?

A. On another sheet I have the details of all that grading estimate,—about the seventh page. This seventh page shows the quantities and the unit prices. I would like to say, in connection with these unit prices, that they are based on the completion of the entire Northern Pacific System in ten years, where I suppose that there is a certain amount of plant available for this work, and in order to complete the entire system in ten years, these are about the prices we would have to pay, not to the contractors, but to the contractors and what additional work the railroad company has to do itself.

Q. How do they compare with prices that you are paying at present?

A. Well, they are much less.

Q. Than prices you are now paying for work?

A. Yes, sir.

Q. Will you state what your idea is with regard to the reasonableness of that estimate, based upon your experience and your knowledge of present prices?

A. I think it is a very fair estimate based on what the average cost would be over a period of ten years.

OOR COPY

Q. How long, in your judgment, would it take to reconstruct the Northern Pacific System as it now exists?

A. Ten years at least."

Again, on page 11:

"Q. And you apply the current prices to the work, as I understand it?

A. I apply the prices that I have assumed on the supposition that the work will be done in ten years. All my prices are based on that assumption."

Page 537.

"Q. I notice here in '36' cost of roads purchased on that exhibit nothing included; where is the cost of the reproducing of the roads purchased in this statement?

A. This statement does not purport to be the cost of anything. It is an estimate of the cost of reproducing those lines now."

Page 583.

'Q. I think that you testified, when you were on the stand before, that in your judgment, based upon your experience in such matters, notwithstanding the fact that there is a temporary depression in prices below what they were in 1906 and 1907, if the Northern Pacific road should start to build its something over eight thousand miles of track within the shortest practicable time, which you think would be ten years, it would have an influence in stiffening prices back to their highest level; have you so testified?

A. Yes, sir."

(Vol. 7, pg. 3241.)

"Q. Mr. Darling, this estimate, which you have given here, including all your testimony in this case, has been upon the theory of reproducing the Northern Pacific System at the present time?

A. Yes, sir.

POOR C

Q. You have not attempted to give any statement as to the actual cost of constructing the system?

A. No, sir.

Q. Nor have you attempted to make any statement as to the present actual value of the system?

A. No, sir.

Q. But your testimony from the first time you testified in this case until the present, has been based entirely upon the theory of reproduring it as you have explained it?

A. Yes, sir.

Q. That theory is, I believe, that the territory traversed by the Northern Pacific is in the same condition that it is at present, with the exception that you imagine the Northern Pacific system eliminated?

A. Yes, sir.

Q. And that you are now to enter upon the work of reconstructing the entire system within the shortest possible space of time?

A. Within the most economical space of time, yes, sir.

(Page 3243.)

"Q. You have assumed, in giving this statement, that the method pursued by you for ascertaining the cost of reproduction, under the circumstances described by you, is the proper method of ascertaining the value to be arrived at in this case?

A. I have made no estimate on the value, Mr. O'Brien.

Q. Made no estimate on the value?

A. No, sir.

Q. Well, in preparing these tables, do you mean that you did not proceed upon the theory that the cost of reproduction as given by you would show the value of the road, or that you simply adopted the theory which you were instructed to adopt?

A. No, my problem in this was merely to

produce the cost of reproducing the railroad at this time."

(Page 3245.)

'Q. Do you know what the cost of the original construction of the present Northern Pacific was per mile?

A. No, sir, I couldn't say."

(Page 3246.)

"Q. But as I understand it, you don't present your tables and testimony with the claim that they do establish the actual value of the Northern Pacific System, either in Minnesota or outside of Minnesota, as it exists at the present time?

A. No, sir."

Mr. John B. Berry, a civil engineer, prepared an estimate of the cost of reproducing the Northern Pacific System, and was produced as a witness upon behalf of complainants. His testimony is found in Vol. 3, Northern Pacific Record, pg. 718 to 904, inclusive. We quote the following (page 720):

"Q. Have you made an estimate of the present cost of construction of the Northern Pacific System?

A. Yes, sir, as of date June 30, 1906, and it remained about in the same condition during the whole of that year."

He produced Complainants' Exhibit 24, Berry (see pg. 722) which is entitled "Estimated Cost of Reproducing the Northern Pacific Railroad based on its conditions and mileage of June 30, 1906, as near as it is possible to get it from an inspection of the main line made in August, 1908. * * *"

POOR C

In the Great Northern case (Simpson v. Kennedy, No. 600), Mr. Hogeland, Chief Engineer of the Great Northern Railway Company, presented an estimate of the entire cost of reproducing that road. He first presented a map (Exhibit 1-Hogeland) upon which was outlined a plan for the construction of the road during a period of eight years from which it appeared that Mr. Hogeland's suggestion was that it be imagined that different and unconnected portions of the present system would be necessarily constructed during one or another of the eight years so taken as the period for the entire construction. He then produced an estimate of the cost which was marked Exhibit 2-Hogeland. He testified as follows, Vol. 2, pg. 11, Great Northern Record (No. 600):

"Q. Turning to this collection of tables marked Complainants' Exhibit 2, Hogeland, will you briefly state what the first sheet shows?

A. The first sheet shows the summary of the cost of reproduction of the lines in Minnesota, of the sheets which follow."

Page 66.

"Q. Mr. Hogeland, your Exhibit No. 2 is entitled 'Cost of reproduction of lines in Minnesota.' Will you please state just what you mean by the 'Cost of reproduction' of your lines in Minnesota?

A. To reproduce them as they existed at that date, June 30, 1908, in the same physical condition as near as it would be possible to do.

Q. What conditions did you assume as surrounding the construction?

A. We assumed the conditions, so far as the construction was concerned, the same as

OR COPY

was found when the lines were originally constructed.

Q. Do I understand you to mean that you assumed that the railroad was not in existence, and that you were starting out to build it under circumstances, the same as those which existed at the time when the road was built?

A. Yes, sir, so far as the Great Northern is concerned.

Q. That assumption would not apply to all of the items in your exhibit, would it, especially as to the valuation given of right-of-way yards and terminals?

A. No, sir, it would not apply to the value of the right-of-way and terminals."

Again, on page 67:

"Q. Well, why did you get it into your head that the cost of reproduction was the measure of the value of the road?

A. Well, I have not said that that was the measure of value, but this statement is a statement of the cost of reproduction.

Q. This testimony of yours, Mr. Hogeland, as I understand it, is intended to bear upon the value of the railroad for the purpose of establishing the basis upon which rates should be allowed, is it not?

A. Yes, sir, I understand it that way.

Q. Well, is it your opinion that, for that purpose, the right-of-way and terminals of the company should be assumed to be acquired now, under present conditions, instead of taking conditions in which they were actually acquired?

A. I think so.

Q. Why?

A. Because that is what it would cost to secure them at the present time.

Page 69.

Q. So that when you start out with the supposition that there is no railroad in a certain locality, and yet that existing conditions brought about from the existence of that rail-

POOR

road are there, you are assuming an impossibility?

A. I think the whole scheme of reproduction is somewhat along that line, but it seems to be the best—

Q. Seems to be along the line of impossibility?

A. Yes.

Mr. Holden: Mr. Hogeland, finish your answer.

A. —but it seems to be the only way of arriving at a fair measure of value.

Q. That is, in other words, Mr. Hogeland, it is the method which gives a very much larger value to a railroad than could by any process of reasoning be given it in any other way?

* * * * *

Page 70.

A. I think this method gives a larger value to the Great Northern than would be obtained by some other methods which might be used.

Q. And that is in fact, Mr. Hogeland, the only justification for resorting to that method of ascertaining, or pretending to ascertain, its present value?"

Thereupon an objection was interposed and a somewhat interesting discussion took place which is found in Vol. 2, G. N. Record, pages 70 to 79, inclusive, and during the course of which, Mr. How, one of Complainants' counsel, said (pg. 77):

"Mr. How: I don't think the statement ought to go unchallenged that Mr. Hogeland has offered testimony showing the value of the Great Northern System. He has not. He has offered testimony showing the present cost of construction. The ultimate fact to be found by the Master is the value from these various things that will be offered. Now, this property

OR COPY

> may be much more valuable—and is, we believe—than the present cost of construction of the physical property, including its equipment, and that is by no means the ultimate and only test, probably of the value of the system. * * *"

Another interesting discussion with reference to the production of evidence showing the original cost is shown upon pages 86 to 90, inclusive.

We cannot better illustrate the extremely improper length to which this method for obtaining unit prices was carried than by showing how the price claimed for oak ties was produced.

Item 5. "Cross-ties and Switch-ties" in the Master's summary, Vol. 1, pg. 235, N. P. Record (No. 599) was found:

Northern Pacific	$3,657,576.70
Great Northern	$5,460,809.
Minneapolis and St. Louis.	$1,149,829.

and is an important item in itself.

Inasmuch as ties are constantly being purchased along the line the price claimed was easily tested by the prices being actually paid, while the witness was upon the stand. This resulted in a complete disclosure of the unwarranted assumptions indulged in by Complainants' witnesses and showed the unit prices adopted by them to have been excessive. Thus Mr. Hogeland testified, Vol. 2, pg. 101-2, G. N. Record (No. 600):

> "Q. Well, we will proceed along in the order in which you gave your testimony. On page marked Item No. 5, which relates to cross-ties and switch-ties, you have given the num-

POOR C

ber of ties, as I understand it, in your system within the state, at the time this estimate was made, as of June 30, 1908, giving the different kinds of ties that were actually in the road at that time?

A. Yes, sir, as nearly as we could get at it.

Q. And at the bottom of the exhibit you have undertaken to give the valuation of those ties. You put in oak cross-ties, 1,084,470 at 85 cents; did you pay 85 cents for oak ties on your road?

A. No, sir.

Q. Where did you get those ties? Where did they come from?

A. Practically all from points in Minnesota.

Q. Northern Minnesota?

A. Central and Northern Minnesota; yes, sir.

Q. And this price does not purport to be what you were paying for ties, during the time of the estimate, does it?

A. No, we have obtained very few oak ties, for the past few years.

Q. And where have you obtained your cedar ties?

A. Partly from Wisconsin, partly from northeastern Minnesota.

Q. And that is true not only of the ties, but of other materials in your road, they are practically all from this state, are they not?

A. Yes, sir; practically all.

Q. How did you come to return the oak ties at this price, 85 cents?

A. I put them in at that price because I figured that if we could obtain that number of oak ties, they would cost us that much.

Q. Well, is that the price you were offering for oak ties at the time you made the estimate?

A. No, sir.

Q. It is considerably in advance of what you were offering, is it not?

A. Yes, it is considerably higher than what we were offering.

OR COPY

Q. And considerably higher than you ever paid for oak ties?

A. Yes, sir.

Q. What were you paying for oak ties at the time you made this estimate?

A. I think about 65 cents. But it is fair to say that we were not getting any to speak of. In fact, the oak tie timber in Minnesota is practically exhausted."

* * * * *

Page 105.

"Q. How do you justify putting into your estimate of value a price so much higher than you actually paid for ties at the time?

A. Because of the number we would have to get to reproduce the line."

"Q. Well, now, I don't exactly comprehend why the price should be very much more if it was built more expeditiously.

A. It is like every other thing, if you go into the market for a large amount and the supply is only sufficient to supply half that amount your price immediately rises."

Mr. John F. Stevens, a civil engineer, was produced as a witness in the Great Northern case to support Mr. Hogeland's estimate. His testimony illustrates our position that cost of reproduction as adopted in these cases may show anything except the truth. He said, Vol. 2, pg. 431-2, G. N. Record (No. 600):

"Q. Item No. 5 covers ties, cross-ties and switches. The foot of the exhibit shows a table of prices based upon as nearly accurate as may be a count or estimate of the actual kind of ties in the system; the first item is oak ties, of which it is shown that there is something over a million ties, and the price is eighty-five cents. I would be glad if you would state something about the market conditions

POOR

of ties at the present time and your judgment as to whether it would be possible for that price to reproduce over a million oak ties in the lines of this Company in this state.

A. Well, unless the oak has grown very fast in the last five years it would be simply impossible. I know that you couldn't do it five years ago at practically any price. I don't think they are in the state, I don't think the timber is in the state to make them, within any practical hauling distance of the railroad lines.

Q. Where are oak ties to be obtained at the present time?

A. There is a good deal of oak timber left yet in Arkansas and southern Missouri, eastern Indian Territory, and farther south; there is a great deal in the Tennessee mountains, West Virginia and eastern Kentucky. That is the only great amount, and that is only comparatively great to what it used to be, that I know of, of standing oak timber in the United States. I am speaking now of white, post or burr oak. Red oak, of course, is unfit for ties. I had a pretty intimate knowledge of the oak-tie situation throughout Missouri and Arkansas and Indian Territory in my connection with the Rock Island. Of course, I know very little about the present situation in Minnesota. I can only reason from the situation as it existed and it has constantly been growing worse in the last twenty years.

Q. Now, assuming that the proposition is to reproduce that quantity of oak ties, is it your judgment that the price shown there is a reasonable price?

A. Why, I think that is rather a peculiar situation; I don't think any price you are a mind to put in would bring the ties in Minnesota locally.

Q. If that price is largely based upon the price of oak ties at St. Louis, plus the freight rate to Minnesota, have you an opinion as to whether that is an unreasonable basis in con-

OR COPY

sidering the matter, on the basis of reproducing those ties?

A. If you brought the ties from the south, they would cost you 85 cents, at least, delivered here; I can tell you that."

* * * * *

Again, at page 493-4 (same Record) Mr. Stevens testified:

"Q. In giving your testimony, Mr. Stevens, with reference to that exhibit, you took into account, did you not, the suggestion of Mr. Hogeland that instead of confining himself to the prices as of June 30, 1908, he speculated as to the probable prices that he would have to pay during this theoretical eight years of construction, especially so as to ties and rails?

Mr. Holden: I don't think he made any such suggestion as to rails, General.

A. Why, I don't know particularly what Mr. Hogeland said about it. I certainly, as I expressed myself, took into consideration on the question of ties that there would be a rise of timber during the next eight years."

* * * * *

The Master accepted the claim of the Complainants as to this item in the Northern Pacific case and slightly reduced the claims made in the Great Northern and Minneapolis and St. Louis cases. In finding the amount in the Great Northern case, this significant language is used, Vol. 1, pg. 226, N. P. Record (No. 599):

"* * * The rapidly increasing price of ties since that time clearly justifies the finding here made."

If the problem were to find the value of a building constructed of white pine, which has now almost disappeared from the American market, it

POOR CO

would not be a fair test of value to show that a forest of white pine existed in some remote part of the world, and to assume that it would be necessary at a fabulous cost to organize an expedition to secure a sufficient quantity of that material to reconstruct the building, as other material of equal strength, beauty, and utility could be more economically secured. But such, in effect, was the method followed in these cases to show the cost of reproduction which the Master finally accepted as the sole test of present value and to use his language "the fairest and most equitable basis upon which to predicate rates."

Depreciation.

It is not necessary for us to enter into an analysis of the testimony for the purpose of showing that some of the property had in fact depreciated and therefore "cost of reproduction new" could not be its present value. The Master affirmatively found depreciation had occurred, but for the reasons given by him he refused to make any allowance on that account.

Unless the reasons given by the Master for his determination in this respect are sufficient to justify this Court in overruling the decision in the Knoxville case, we see no escape from the conclusion that upon this ground alone the basis taken by the Master must be rejected and the decrees reversed.

Under the heading "Depreciation," the Master said, Vol. 1, pg. 238 N. P. Record (No. 599):

COPY

"Having thus found the cost of reproduction new of these several railroads' properties, the question remains, what, if anything, shall be deducted for depreciation.

It is established that the roadbed is constantly increasing in value. It becomes solidified, embankments and slopes of excavations become settled and stable and so the better resist effects of rain and frost. It becomes adjusted to surface drainage and the adjustment is made permanent by concrete structures and rip-rap, and in other ways a roadbed long in use is far more valuable than one newly constructed. On the other hand, everything on and above the roadbed depreciates from wear and weather-stress. The life of a tie is from eight to ten years only. Structures become antiquated, inadequate and more or less dilapidated. Ballast requires renewal, tools and machinery wear out, cars, locomotives and equipment, as time goes on, are worn out or discarded for newer types. A large part of the depreciation, however, is taken care of by constant repairs, renewals, additions and replacements, a sufficient sum being annually set aside and devoted to this purpose, so that this, with appreciation of roadbed and adaptation to the needs of the country and of the public served, together with working capital hereinafter mentioned fully offsets all depreciation and renders the physical properties of the road not less valuable than their cost of reproduction new. This conclusion is fully supported by the evidence and also justifies the language hereinbefore cited from the Missouri, Kansas and Texas Railway case, decided by Mr. Justice Hook.

There is another element which may properly be considered in connection with the question of depreciation and as an offset to it. It is necessary that the companies should have on call a large sum of money for the conduct of the business and to meet emergencies. No doubt a large part of it draws a low rate of interest

POOR

while on deposit in bank, but it must be that very considerable amounts are idle and unproductive and must be considered as an element of value in the matter of rate-making.

In view of all the foregoing considerations, it follows without question that there should be no deductions on account of depreciation."

Later the Master again took up the subject of depreciation and said (Vol. 1, p. 243, N. P. Record, No. 599):

"Good-will and corporate franchises are not proper elements of such valuation. Patronage and good-will of the public are its contributions to the success of the enterprise, for which it is not to be assessed. Corporate franchises are the free gift of the government conferred upon any organization willing to embark in such undertaking, but *knowledge, derived from experience, adaptation to the needs of the public and readiness to serve,* together with physical appreciation of roadbed, and a reasonable amount of working capital always on hand for immediate use, are matters of value which will fully offset depreciation arising from use and weather-stress."

In the Knoxville case, at page 9, this Court said:

"The cost of reproduction is one way of ascertaining the present value of a plant like that of a water company, but that test would lead to *obviously incorrect results,* if the cost of reproduction is not diminished by the depreciation which has come from age and use."

Even if any of the considerations mentioned by the Master are proper elements of value it is apparent that, if the inventory is to show present value, the amount the property has depreciated must be shown. If the inventory should include a bank account called working capital, well and good,

OOR COPY

but the present value of a locomotive does not depend upon the size of the bank account.

The findings do not show the amounts thus respectively allowed. Mr. Morgan claimed in round figures $8,000,000 depreciation in Northern Pacific property and $13,000,000 in Great Northern; the Master found only that *depreciation existed.* If he had found the amount of such depreciation and then the value of the "Knowledge" some officer of the corporation possessed and also the value of "readiness to serve,"—even though it did not appear whether this referred to the mental attitude of the officers or the condition of the equipment,—this court could pass upon the propriety of the findings. As it is we know of no way of telling what the Master intended to find, or the value of whose knowledge he thus added to the property.

In the absence of specific findings, it cannot be said, that the balance, thus mentally struck by the Master, was correct.

In addition, can any such elements be allowed? If so, a railway with skillful officers may charge higher rates than one officered by men of less commanding ability.

It is difficult to know how the Master failed to realize that in accepting reproduction cost, as claimed in these cases, as "the fairest and most equitable basis upon which to predicate rates," he was not only including every element, such as franchise and good-will, which, he says, should not be included, but valuing each at an excessive amount.

POOR

What difference does it make whether what is called the franchise, or right to be a corporation, be given a specific value, or every right, granted by the public to the corporation, as such, and for its corporate purposes, and each accumulation secured from charges to the public, be included as a specific item to be valued. This is just what was done here under the assumption and name of reproduction cost, the only difference being, that, in some respects the findings are so obscure that one cannot say what value was attached to some elements, and the method as adopted afforded an opportunity for claiming fabulous amounts, which, if placed before the Master in their true character, would have shocked his sense of justice.

A LARGE PART OF PRESENT PHYSICAL VALUE HAS ACCRUED FROM THE USE OF EARNINGS AND ACCOUNTED FOR NOT AS CONSTRUCTION, BUT AS AN EXPENSE OF OPERATION.

If we consider only the items of actual property found in the inventory, and ignore the excessive unit prices assumed, there still is an element of value included upon which the carrier is not entitled to a return, as it represents no investment made by it, but upon the contrary has been contributed and paid for by the public. This element consists of the additions and betterments made from day to day by the regular force of employees, carried upon the pay rolls of the company, and, whose wages and the cost of material used by them

OOR COPY

come from the earnings of the company and are accounted for as part of the expense of operation.

In this way grades are improved, ballast added, drains constructed and innumerable additions made to what we have termed construction. (Master's report, Vol. 1, p. 238, N. P. Record.) In preparing the inventory and computing quantities all amounts so added were included. In support of this we refer to the following testimony:

Mr. Darling, Chief Engineer of the Northern Pacific, said, Vol. 7, pg. 3227, N. P. Record (No. 599):

> "Q. Mr. Morgan has allowed, under his item of adaptation and solidification of roadbed, $1,613,612.76. You omit that item entirely and make no estimate with regard to that. Will you say why you left that out?
>
> A. That is left out for the reason that we did not consider depreciation or appreciation of the property. The appreciation of the property is so much greater than that of depreciation that depreciation was not considered, and it is almost impracticable to tell what the appreciation is.
>
> Q. In dollars and cents you mean?
>
> A. In dollars and cents, yes, sir. It varies entirely with the life of a road and the perfection to which that road has come from constant work by the section men, the lapse of time, becoming settled by the elements and by the heavy traffic over it. I would not want to estimate what the appreciation would be, but it is a great deal more than the depreciation. * * *"

and again, at page 3246-7, same record:

> "Q. What information and assistance does it give you, in making this estimate of the present cost of construction of the Northern Pacific

as it now exists, to be advised as to just what it consisted of and what it cost in 1880 or 1873 or any other time?

A. It would be of no benefit at all in making this estimate.

Q. It is not the same system, I take it, at all?

A. No, sir.

Q. Not the same railroad, an entirely different and much improved railroad?

A. Yes, sir.

Q. And that has been accomplished by the expenditure of a great deal of time and a great deal of money, I take it?

A. Yes, sir.

Q. So that a comparison between the system as it existed in 1880 and as it exists in 1909 is of no value?

A. Not as showing the cost of reproduction."

* * * * *

It seems to have been assumed by Counsel for Complainants that "Original Cost of Construction" refers to some remote period of time and so they speak of the cost of 1880 as though original cost must have ended at that time.

This was an erroneous conception of the term and is another illustration of peculiar and special meaning with which words or sentences capable of different constructions were constantly used.

Mr. Gray, Comptroller of the Northern Pacific Railway, testified as to the cost of the original construction and presented a statement marked Complainants' Exhibit 15-Gray. (N. P. Record, No. 599.) The statement is headed:

"Cost of Construction and Equipment of Northern Pacific Railroad and Northern Paci-

fic Railway, from September 29, 1875, to April 30, 1908, as Shown by Reports Made to the Interstate Commerce Commission to June 30, 1907. The Expenditures Since That Date Being Added from the Company's Books."

Upon the part of the State there was prepared from the annual reports of the Company, year by year a similar statement which was verified by Mr. Gray as a correct statement so compiled, although he claimed it failed to include every cost. This statement was received in evidence as a part of the cross-examination of Mr. Gray and was marked "Defendants' Exhibit V-Gray." It is entitled:

"Cost of Construction and Equipment of Northern Pacific Railway from September 1st, 1876, to June 30th, 1907."

If, therefore, "a great deal of money" had been expended upon the road which did not appear in Mr. Gray's statement of cost of construction, it was money appropriated from earnings and called expense of operation.

We give the following from the testimony of Mr. James J. Hill in Great Northern Case, Vol. 3, pg. 1304 G. N. Record (Simpson v. Kennedy, No. 600):

"Q. Well, then, considering all of these elements of depreciation and appreciation, would you say it was a fair statement that the Great Northern property, in view of the length of time that had elapsed since it was constructed, is more valuable, as an operating machine, as it stands today, than an entirely new system presently constructed.

A. Very much more valuable as it stands today; there isn't any question or room for any doubt about it. Anybody who knows anything about it would certainly come to that conclu-

POOR

sion; there isn't any other conclusion he could come to, if he was in his right mind."

* * * * *

We desire to call attention to Mr. Hill's testimony upon cross-examination; Vol. 3, pages 1326 to 1341, inclusive, G. N. Record (600). We quote as follows, pg. 1326:

"Q. Well, you suggested, I think, that the comparatively lower level of capitalization per mile in this country arose from the fact that habitually the railroads in this country accumulated a working capital out of which, when improvements had to be made, they were paid for from the treasury, which kept the capitalization down. Is that correct?

A. Yes, sir; that has been largely the practice. Sometimes that working capital is supplied by the surplus in prosperous years, and sometimes it is supplied from the sale of securities, but mainly from surplus."

* * * * *

Page 1329-30, same record:

"Q. Could you tell to what extent those improvements were made out of capital and to what extent out of surplus?

A. It would be very difficult. I don't know that there is any separation of the accounts that would show that. We might possibly, (and I don't know that we could,) show how much was the amount paid for these permanent improvements all over the system, and how much was appropriated from surplus earnings towards that and the difference would be made up from the stock. But that would apply to the whole system.

Q. Of course, in addition to these improvements of the roadbed and track that are made on what might be called a large scale, there is constanty going on a work of improvement in the track by means of the labor that is being expended upon it by the section crews?

OR COPY

A. Well, the section crews properly do not make much improvement in the track—very little. That would be, you might say, confined to the push-car work of the ditchers, but they are very apt to unload it at the mouth of the cut and get rid of it as soon as they can, and the embankment becomes too wide, rather than to carry it farther, but it is done by extra gangs and work-trains largely.

Q. When a depot becomes antiquated, either by depreciation, or because the business has outgrown its capacity and a new one is erected, that is paid for, is it not, out of earnings, as a rule?

A. Well, sometimes. That is at local stations that would be the rule. Take a terminal depot, a terminal station, a plant, for instance, like Spokane Falls, that would not.

* * * * *

Page 1332-3, same record:

"Q. And you understand maintenance of the property to include not only keeping the property in the condition it was in when you began its operation, but also keeping it in a condition where it is capable of doing the increased amount of work?

A. We have to meet the demands made upon us for transportation, both freight and passengers, and the old road, built of the local material taken from the side of the grade or from local cuts and put into the fills, would not be sufficient; the rails and the whole plant would be too light to carry the modern machinery, and we have to increase it.

Q. Yes, there is no question about that, but the thing I wanted to get at, if I can, is just how far does the rule relating to maintenance extend. That is,—

A. Well, it covers beyond the maintenance of the property as it was originally constructed."

* * * * *

In the Cumberland case (212 U. S. 414) this Court said, p. 424:

> "It was obligatory upon the complainants to show that no part of the money raised to pay for depreciation was added to capital, upon which a return was to be made to stockholders in the way of dividends for the future. It cannot be left to conjecture, but the burden rests with the complainant to show it. It certainly was not proper for the complainant to take the money, or any portion of it, which it received as a result of the rates under which it was operating, and so to use it, or any part of it, as to permit the company to add it to its capital account, upon which it was paying dividends to shareholders. If that were allowable, it would be collecting money to pay for depreciation of the property and, having collected it, to use it in another way, upon which the complainant would obtain a return and distribute it to its stockholders. That it was right to raise more money to pay for depreciation than was actually disbursed for the particular year there can be no doubt, for a reserve is necessary in any business of this kind, and so it might accumulate; but to raise more than money enough for the purpose, and place the balance to the credit of capital upon which to pay dividends, cannot be proper treatment."

This consideration was entirely ignored and that fact is another illustration of the absolute wrong to the public which would result from accepting reproduction cost of all property as a basis for rates, even though the method were stripped of the "assumptions" so improperly indulged in here.

ITEM 30.

Engineering superintendence and legal expenses 4½% 1 to 28 ..... $2,785,036
(Master's report, Vol. 1, pg. 235 N. P. Record.)

If the problem were to ascertain original cost of construction and one had only a statement of the number of yards of material moved and so on through construction work, together with the unit prices paid for the work and material, it would be eminently proper to add an estimate for engineering expenses, but no such problem is here involved. There is to be no construction, and actual original cost was entirely rejected by the Master as a basis for value. This item therefore is purely fictitious and should not have been included in the inventory.

The use of the item, however, presents an opportunity of showing the extravagance of the amounts allowed as Cost of Reproduction.

Complainants' claims in Northern Pacific case, as to original construction cost, were given by Mr. Gray, Comptroller, in his statement "Complainants' Exhibit 15-Gray." (Vol. 10, N. P. Record, No. 599.)

The only item in "Complainants' Exhibit 15-Gray" corresponding to the one we are considering is the item Engineering, $3,873,263.16.

That amount only having been actually expended on such account for the construction of the entire system, how can it be claimed that $2,785,036 would be a fair amount to assign to Minnesota.

Of course many specious reasons can be given for this discrepancy, for instance that legal expenses are not included in Mr. Gray's statement nor the enginering expenses in connection with lines purchased after construction and perhaps many others.

The fact remains that it is a purely fictitious and imaginary item, except when used in connection with and as a part of actual construction cost. So used the actual amount necessarily expended is an eminently proper item and we would not for a moment claim it should be stricken out of "Complainants' Exhibit 15-Gray," but as used here it is an excellent illustration of the result which must follow accepting as an actuality an admittedly false assumption. Thus the items upon which this particular item is based are increased as already explained by assuming an increased demand for labor and materials. Then the engineering cost is arbitrarily fixed at a percentage of the already improperly increased amounts and finally the amount arrived at as reproduction cost is not dependent upon any actual fact or item of property, but upon the whims of the individual making the computation.

ITEM 37.

"Contingencies" 5 per cent 1 to 34.....$3,710,479

(Master's report, Vol. 1, pg. 236 N. P. Record, No. 599).

In actual construction, unforeseen obstacles, costs and misfortunes arise which must, in a projected work, be guarded against by some allowance. There is nothing of this kind in the present problem. Mr. Hill and other witnesses gave testimony filling many pages of the record devoted to showing that in the construction of railways, sink holes and other unforeseen obstacles would be encountered. Those obstacles have been met, the additional quantities of material required to fill the sink holes, over and above any original estimates which were made, have been supplied, are in place and included in the quantities shown and as to which there was no practical dispute, resulting from the fact that since 1905 Mr. Morgan, Engineer for the State, had been engaged in securing an inventory of railway properties and while some slight differences remained, Mr. Morgan's day by day and item by item method secured a general checking up and agreement as to quantities.

Hogeland, Vol. 4, pg. 1634-5 and 1753 G. N. Record (No. 600).

This being so, there were no contingencies to provide for. Every yard of material moved, every pound of steel used, and every other item of the actual inventory was known with a certainty which practically precluded dispute.

ITEM 39.

"Interest during Construction"..... $7,420,957

It is difficult to say anything which will add to a bare statement that such an item is included in the inventory.

In this case the facts are that a prosperous and active railroad undertakes to make an inventory valuation of its property to be used as the basis for its charges to the public. The railway is in entire operation and as the testimony shows is not only paying a handsome return to its stockholders, but is accumulating an immense surplus. Notwithstanding all this, and much more, it is proposed to imagine the road out of existence, as a business enterprise, for a period of eight years during which time it is to be rebuilt by money to be borrowed and during which time it is to be entirely non-productive. And it is concluded by the Court that in addition to a return upon the physical value of the property actually devoted to the service the carrier is entitled to rates which will enable it to earn a return upon an amount arbitrarily fixed as the interest the company would be compelled to pay if each physical condition actually in existence ceased to exist and new conditions not in existence became actualities.

In addition to all this the time assumed for reconstruction is purely arbitrary and the amount of interest thus claimed may be fixed to suit the taste of the estimator. Thus the amount claimed for interest by Mr. Darling in the Spokane rate

case, decided February 9, 1909, was $23,000,000. City of Spokane v. N. P. Ry. Co., 15 I. C. C. 376, 395. This, of course, was for the entire system. By Complainants' Exhibit 2-Darling this amount for April 30, 1908, is given at $39,804,659. (Vol. 10, N. P. Record.)

Mr. Darling testified, Vol. 7, pg. 3242, N. P. Record (No. 599):

> "Q. There never has been a railroad constructed in the manner which you assume this road would be reconstructed or reproduced?
> A. Not to my knowledge."

BRIDGES ORIGINALLY BUILT BY MUNICIPALITIES AND CROSSING RIGHT-OF-WAY SHOULD NOT HAVE BEEN INCLUDED.

This error appears in Item Eleven in the Minneapolis and St. Louis Case (Simpson v. Shillaber, No. 601). The facts appear in the Master's report, Vol. 1, pg. 230, N. P. Record (599), where it is said:

> "The difference betwen the parties on this item is $354,292. Except as to three overhead bridges in Minneapolis, the chief witnesses seemed to harmonize as to quantities. It was claimed by the State that the three bridges mentioned were built by the city and for this reason no allowance was made therefor. But as they apparently form a part of street highways, as the law now is, their repair and renewal as required must be borne by the company and the city could not have been compelled to construct them in the first instance if the law had been properly interpreted and observed. Their reproduction cost should have been allowed at the sum of $54,580. * * *"

How can the carrier be entitled to a return upon the cost of a bridge built and paid for by a municipality? A structure not owned by the carrier and in which it has not a penny invested. The Master thought an allowance should be made for this item because the carrier might at some time in the future be compelled to make an investment in repairing or renewing the bridges. If that justified the Master in including in present value such possible future investment why would it not have been proper to have estimated the population and traffic of the State twenty years hence, made estimates of all future investments of the carrier for that period and designated them as elements of present value.

The Master's conception of the elements going to make up reproduction cost as shown by his inclusion of these bridges and the area of public streets emphasizes what we have said as to the analogy between donated right-of-way and trackage rights or privileges in public streets, either below or upon the surface.

If the property of a street railway company were being taken over by a Municipality, it would not be claimed that the area in the streets occupied by the tracks should be paid for as land belonging to or invested in by the company. That privilege was one conferred upon the company to make its investment remunerative, but just as soon as the return is computed upon both the investment and the free grant an excessive return upon the investment must result.

ITEM 40.

"Interest in Terminal properties," St. Paul Depot, Duluth Depot, Minnesota Transfer $2,204,344

It is doubtful if these three subsidiary companies should have been included at all as each is an independent corporation. However, their inclusion at the amounts found affords an excellent opportunity for showing the impropriety of the methods adopted in these cases. The receipts of these subsidiary companies consist of payments from the railway corporations, fixed by agreement between the corporations themselves, thus enabling them to make investments from earnings and claim a return upon the amount so used, or, as in this case, upon the reproduction cost of the property invested in. The actual cost to the Northern Pacific Railway of its interest in each was given by Mr. Gray in Defendants' Exhibit AA-Gray, Vol. 9, N. P. Record (No. 599) as follows:

St. Paul Union Depot Company	$50,000
Duluth Union Depot Company	150,000
Minnesota Transfer Company	7,000
A total for those three of	$207,000
The Master allowed for the same interests	$2,204,344

In his oral testimony Mr. Gray gave the investment in St. Paul Union Depot as $103,600, Vol.

POOR

2, pg. 408, N. P. Record (No. 599). Either of the amounts so given is sufficient to illustrate our position.

Mr. Elliott testified with reference to these terminal companies, Vol. 4, pg. 1291, N. P. Record (No. 599):

> "Q. Is it true that in each of the corporations, or to each of the corporations, when a service is performed by it, your company as well as the other company, pay a charge?
> A. Yes, sir.
> Q. And those charges constitute part of the operating expenses of the Northern Pacific Railway Company?
> A. Yes, sir.
> Q. And are so entered upon your books?
> A. Yes, sir."

This item 40 contains a still more startling example of the results which follow the adroit commingling of values derived from both capital and earnings. The amount allowed for the 1/10 interest owned by the Northern Pacific Railway in the Minnesota Transfer Company is $575,600.

This amount is not separately stated in the Master's Report, but an examination of item 40, Master's Report, Vol. 1, pg. 233, N. P. Record (No. 599) in connection with Complainants' Exhibit 2-Darling, shows the above to be the amount found as the value of the 1/10 interest. The total investment of the Northern Pacific Railway in the Transfer Company was $7,000. (Defendants' Exhibit AA-Gray) where under the heading, "Total Cost to Northern Pacific Railroad Company," appears this item:

Minnesota Transfer Railway Co....$7,000

OR COPY

The Transfer Company is located midway between the business centers of the Cities of St. Paul and Minneapolis and is the general transfer point for freight of every kind between the railways reaching those cities.

The Transfer Company, according to its report to the State for the year ending June 30, 1908, had fully paid up and issued:

Capital Stock	$70,000
Mortgage bonds	1,908,000
Total	$1,978,000

The interest on the bonds, of course, came from the operating expenses of the roads, so that the total actual investment was as given by Mr. Gray, $7,000 for the Northern Pacific, and we presume an equal amount for each of the other roads. Mr. Gray, in describing this situation, said, Vol. 2, pg. 410, N. P. Record (No. 599):

> "Q. Can you tell me the amount of the investment of the Northern Pacific Railway Company in the stock of the Transfer Company in dollars and cents?
>
> A. $7,000.
>
> Q. Does that represent the total amount invested by the Northern Pacific Railway Company in the Minnesota Transfer Company?
>
> A. No. The Northern Pacific has purchased bonds of the Transfer Company from time to time.
>
> Q. To what amount?
>
> A. The Northern Pacific Railway Company does not hold any of those bonds; it has sold them from time to time.
>
> Q. So that $7,000 represents its entire investment in the Minnesota Transfer Company?
>
> A. Yes."

This is a concrete, although extreme, example of the result of cost of reproduction in producing, as applied in these cases, values upon which to base rates. For property costing $1,978,000 the Master finds a value of $5,756,000, while the Northern Pacific Railway Company upon an actual investment of $7,000 is allowed an annual return of 7 per cent upon $575,600, or nearly 600% annually upon the investment.

Another illustration of the expansiveness of this method is found by comparing the findings here with the statement of the Interstate Commerce Commission in the Spokane case. After describing the claim of the Northern Pacific as to reproduction cost it is said, 15 I. C. C.Rep., p. 376-397:

> "It seems altogether probable to us that the money value of this property not including coal properties, *based on the cost of reproduction estimated in the manner above stated* would, in the spring of 1907, have equaled at least $325,000,000."

The Master gave this for April 30, 1908, as $452,666,489, an increase of more than 38% in one year.

The main witnesses for the railway in each case were the same, Messrs. Cooper, Darling and Berry.

THERE WAS NO EVIDENCE THAT "REPRODUCTION COST" IS EQUIVALENT TO "PRESENT VALUE." EVEN THE WITNESSES PRESENTING THE COMPUTATIONS TESTIFIED TO THE CONTRARY.

It is creditable both to the common sense and truthfulness of the gentlemen who prepared and presented the tabulations showing reproduction cost that they repudiated the method as establishing present value.

We have already shown this, but will now refer to the testimony with greater detail.

Cooper, Vol. 2, pg. 198, N. P. Record (No. 599):

> "The Master: When you speak of value you mean cost of purchase?
>
> Witness: Cost of purchase; we are using the word "value" somewhat wrongly, as we are talking along here. It is the cost of purchasing that property today."

Mr. Hayden, Vol. 2, pg. 282, Great Northern Record (No. 600):

> "Q. You do not want to be understood as saying, do you, Mr. Hayden, that the values that you placed upon the right-of-way and the terminals as shown by these exhibits 9 and 10 are the present values of the properties?
>
> A. What I have been asked to do, and what I have done is to give my best judgment as to what it would cost to reproduce the properties as of June 30, 1908,—the cost of reproduction, not their value; not in any other sense their value, but what it would cost to reproduce them.
>
> Q. If you were asked to give testimony as to the value of the right-of-way and terminals of the Great Northern road, would you offer these tables as evidence of that value?

A. I would have to consider it because I have not considered it up to this time.

Q. That is not what you were attempting to prove by these tables or exhibits?

A. No, they are just simply my judgment of what it would cost to reproduce them or repurchase them, at this time, on June 30, 1908.

Q. You mean, Mr. Hayden, do you not, the reproduction under all of the asumptions that you have mentioned in your testimony here?

A. Yes, sir; I have stated how I arrived at these figures and the values are based upon that assumption." * * *

Mr. Darling, Vol. 7, pg. 3241, N. P. Record (No. 599):

"Q. Mr. Darling, this estimate which you have given here, including all of your testimony in this case, has been upon the theory of reproducing the Northern Pacific System at the present time?

A. Yes, sir.

Q. You have not attempted to give any statement as to the actual cost of constructing the System?

A. No, sir.

Q. Nor have you attempted to make any statement as to the present actual value of the System?

A. No, sir.

Q. But your testimony, from the first time you testified in this case until the present, has been based entirely upon the theory of reproducing it as you have explained it?

A. Yes, sir."

* * * * *

Darling, Vol. 7, pg. 3243, same record:

"Q. You have assumed, in giving this statement, that the method pursued by you for ascertaining the cost of reproduction under the circumstances described by you, is the proper method of ascertaining the value to be arrived at in this case?

A. I have made no estimate on the value. Mr. O'Brien.

Q. Made no estimate on the value?

A. No, sir.

Q. Well, in preparing these tables, do you mean that you did not proceed upon the theory that the cost of reproduction as given by you would show the value of the road, or that you simply adopted the theory which you were instructed to adopt?

A. No, my problem in this was merely to produce the cost of reproducing the railroad at this time.

Q. And in doing that you have taken the literal meaning of the word reproduction and have carried it to the full extreme under all circumstances?

A. I have given what I think is a conservative cost of reproducing the railroad."

Darling, Vol. 7, pg. 3246, same record:

"Q. But as I understand it, you don't present your tables and testimony with the claim that they do establish the actual value of the Northern Pacific System, either in Minnesota or outside of Minnesota, as it exists at the present time?

A. No, sir."

Mr. Hogeland, Vol. 2, pg. 161 G. N. Record (No. 600):

"Q. We want to examine you again, Mr. Hogeland, when we get this information that we have asked for, and I just want to ask you in a general way whether this estimate that you have now placed before us of the cost of reproducing this road actually represents either the cost of the road or its present value.

A. No, sir; not necessarily, either."

Mr. John F. Stevens, a civil engineer of national reputation, was called as a witness in the Great Northern case to support Mr. Hogeland's estimates.

We quote as follows from his testimony, Vol. 2, pg. 463, G. N. Record (No. 600):

> "Q. Well, now, in attempting to arrive at the present value of railroad properties, such as these lines in Minnesota, have you an opinion as to a method of this kind which has been called the method of ascertaining what it would cost to reproduce them?
>
> A. Why, my opinion is, of course, of very little value. I will give it to you if you want it.
>
> Q. Well, I think we want it.
>
> A. I think it is perfectly worthless, any valuation of a railway, for any purpose whatever, excepting as a matter of curiosity to the stockholders or directors, if they want to know what it would cost to put it back again; I regard it as a curiosity, pure and simple, when I get through with it."

Everything considered, perhaps the most remarkable instance of the repudiation of the method for ascertaining present value as adopted by the Master, occurred during the cross-examination of Mr. James J. Hill.

Mr. Hill had a greater personal interest in the result than any other person who testified and his commanding position in the business world insures serious consideration of his views. He had testified quite fully as to the many problems connected with building and operating railroads and finally reproduction cost was brought to his attention.

After some preliminary questions and answers, he testified, Vol. 3, pg. 1351 G. N. Record (No. 600):

> "Q. We are supposing that the railroad is there, and, to use the same illustration, sup-

pose that ten years later the farmers' land had increased to $50 an acre—

A. Would the railroad land be worth $150?

Q. Yes, would the railroad right-of-way be worth $150 an acre?

A. For the purpose of reproduction?

Q. For any purpose; would that be a fair valuation of the railroad right-of-way?

A. You are starting a lot of questions that I don't know how to answer. I would answer them if I could, but I don't know how to answer those questions, because the reproduction of a railway of 2,000 miles is something that has never been done, and it is very hard to testify as to what would be accurate in a case that has never been done.

Q. It is really attempting to suppose an impossibility, isn't it, Mr. Hill?

A. *Well, I don't want to testify absolutely on that question.*"

Mr. Hill was and still is ready to accept upon behalf of the stockholders of his railroad the gift which would result from the establishment of this method for ascertaining value, but his regard for his reputation as a man who has the genius of common sense, not to speak of his conscientious sense of duty as a witness under oath, made him refuse his sanction to the theory.

Apparently, Counsel for Complainant in offering the testimony did not claim that cost of reproduction was equivalent to present value.

Thus when Mr. Darling was testifying for the first time the following occurred, Vol. 2, pg. 13-14, N. P. Record (No. 599):

"Attorney General Young: This is on the theory, Mr. How, that the entire system were being reconstructed?

Mr. How: Yes.

Attorney General Young: And this interest and these other items are figured in upon that theory?

Mr. How: Yes.

Attorney General Young: They have no actual relation to the existing road as it stands?

Mr. How: No; we are trying to establish the cost of reconstructing the Northern Pacific railroad as the Supreme Court, in the case of Smyth v. Ames, tell us to do."

Until the Court, in its decision, approved of this method of establishing present value the Master occupied upon that question a position of "magnificent isolation."

THE EFFECT OF THE FOREGOING DISCLAIMERS CANNOT BE MODIFIED OR EXPLAINED AWAY.

It may be argued that by subsequent testimony some of these witnesses so far modified their evidence as to show their opinion to be that present value was at least equal to cost of reproduction.

An examination of the statements made by the witnesses when they were again brought forward will be convincing that no modification was made and that each original statement, to the effect that reproduction cost and value are not synonymous terms, must stand.

Mr. Hogeland testified, Vol. 3, page 1005, G. N. Record (600) as follows:

"Q. I think the very last question asked you in cross-examination was this: 'I just want to ask you in a general way, whether this estimate that you have now placed before us of the cost of reproducing this road actually

represents either the cost of the road or its present value.' To which your answer was, 'No, sir, not necessarily either.' Now, what does Ex. 2 present, what was it intended to present?

A. It presents my judgment of the cost of reproduction as of date given, June 30, 1908.

Q. Now, I would like to have you confine your opinion to the mere physical property, considered as a safe, economical, practical, convenient operating commercial tool and I will ask you if you have an opinion as to the comparative value of a new railroad property, presently constructed, and presently turned over to the operating department for operation, as compared with the Great Northern physical property as it now exists.

A. I would consider that as a tool for handling transportation, the Great Northern as it exists today in Minnesota is much more valuable than the cost of reproduction would indicate; and I base that largely on what time and the elements, together with the work which has been done on the railroad, have produced,—something that can only be produced by time and the action of the elements."

Also see testimony of Stevens, p. 504, et seq. Great Northern Record (No. 600).

Mr. Hill was not asked to explain or modify his statement.

It has never been said by any authority that the basis for establishing rates was the value of the entire property devoted to transportation considered "as a safe, economical, practical, convenient, operating, commercial tool." There is no way of knowing just what is meant by the witness or what elements of value he considers proper to take into consideration. It perhaps is another way of giving what has been designated the "commercial" value

POOR

of the railways. Commercial value is a term used to designate the amount which the net earnings of the company would indicate to be its value upon the assumption that those earnings were originally based upon fair value and are reasonable in themselves. If value were to be found from rates, and then the rates tested by the value so found, we would be engaged in a proceding more absurd than when finding reproduction cost. It would not even be the curiosity described by Mr. Stevens as we would know we would end just where we began. A corporation in receipt of net earnings amounting to six or seven per cent upon its capitalization would necessarily have *during the period such net earnings could be maintained a high commercial value entirely regardless of the physical property owned by it.* Thus the stock of a corporation controlling patent rights might have a high commercial value, although the physical property of the corporation consisted only of an office stool and paper evidence of its patent rights. So with the public service corporation; its commercial value largely, and in some instances entirely, depends upon its earnings and its right in law and good conscience to maintain certain rates and charges.

When the Census Bureau of the Uniteed States Government undertook to ascertain the commercial value of the railways of the United States this was the method pursued. The net earnings of the railways were capitalized, giving what was called the Commercial Value. (Census Bulletin No. 21). In the Report, Bulletin 21, it is said (page 9):

COPY

"The value of the railway properties submitted in this report was arrived at by capitalizing the net earnings of individual railways and railway systems. It was not possible to apply this rule in all cases, but its statement serves to indicate the principle upon which reliance was placed and to make evident the fact that this valuation is designed to reflect the earning capacity of railway property. * * *"

Prior to this statement and at page 8 it was said:

"This is no place to enter upon a discussion of the nature and classification of different kinds of value, but a word of caution may be allowed in order to guard against an unwarranted use of the figures here submitted. The commercial valuation of railway property in so far as it depends on income arising from the sale of transportation is the result, among other things of an established schedule of freight and passenger rates from which it follows that such a valuation cannot be used for determining the reasonableness or unreasonableness of the rates in question. The solution of the rate problem demands a separate valuation of the physical property."

While entirely unnecessary to follow the witnesses who thus claimed some indefinite value above reproduction cost we call attention to the fact that "reproduction cost" as adopted by the Master greatly exceeds commercial value computed on the basis of net return here found necessary.

EFFECT OF ACCEPTING "REPRODUCTION COST" AS PRESENT VALUE.

In the following illustration of the result which would follow the affirmance of these decrees and the establishment as a universal principal that "reproduction cost new" is the equivalent of present value and "the fairest and most equitable basis upon which to predicate rates," we have, for the reasons already given, taken the capitalization of the companies as of January 1, 1905.

Disregarding all excess in this capitalization and taking each company's securities at par we have:

Northern Pacific, entire system, Reproduction		$452,666,489
Stock	155,000,000	
Bonds	190,000,000	345,000,000
Excess		$107,666,489
Great Northern, entire system, Reproduction		$457,121,469
Stock	149,577,500	
Bonds	83,119,939	232,697,439
Excess		$224,424,030
Minneapolis & St. Louis, Minnesota only, Reproduction		$21,608,464
Stock and bonds assigned to Minnesota by Master, Vol. 1, pg. 240 N. P. Record		13,203,718
Excess		$8,404,646

OOR COPY

In the following table we have brought these amounts together and ascertained that the aggregate reproduction cost thus found is equal to 156.26 per cent of the total par value of the stocks and bonds of the three companies. We have then taken from Poor's Manuel of Railroads for 1911 the total amount of the bonds and stocks of the railway companies of the United States and found that 56.26 per cent thereof amounts to the appalling sum of more than Ten Billion Dollars and that to return seven per cent per annum upon such excess alone would require annually the sum of more than Seven Hundred and Forty Three Million Dollars, a sum more than double the Customs revenue of the Government and exceeding the entire annual receipts of the United States Government from all sources except Postal revenue.

In the case of the three railways now here the additional annual amount so required would be $23,474,872.77.

(a) Total capitalization of Railways involved in these cases.

POOR COPY

(a) Total capitalization of Railways involved in these cases.
(b) Reproduction cost as found by Master.
(c) Percentage of excess of Reproduction cost.
(d) Capitalization of all railways in United States.
(e) Reproduction cost of all railways on same basis.
(f) Amount annually required to return 7% on excess alone.

Railway.	Capitalization (par value) A	Reproduction. B	Percent of Excess. C	Amount of Excess..	Amount Required to return 7% on Excess alone.
Northern Pacific ..... (Stock	$155,000,000.00				
entire system..... (Bonds	190,256,577.66	$452,666,489.00			
Great Northern ..... (Stock	149,577,500.00				
entire system ..... (Bonds	83,199,939.00	457,121,469.00			
Minneapolis & St. Louis... (Stock &					
Minnesota only ..... (Bonds	18,007,080.00	21,608,464.00			
Totals	$596,041,096.66	$931,396,422.00	56.26	$335,355,325.34	$23,474,872.77
All railways in United States. Poor's Manual of Railroads, 1911. Page XCIII.	D	E			F
Stocks	$8,380,819,190.00				
Bonded Debt	9,600,634,906.00				
Other Bond Obligations...	909,396,197.00				
Totals	$18,890,850,293.00	$29,518,842,667.84	56.26	$10,627,992,374.84	$743,959,466.23

The *Statistical Abstract of the United States,* 1910, Thirty-third number, prepared by the Bureau of Statistics, under the direction of the Secretary of Commerce and Labor, on page 620, under the heading "Recapitulation of Receipts," gives the Customs Revenue of the United States Government for the fiscal year ended June 30, 1910, as $333,683,445, and the entire receipts for the United States Government from all sources, excepting Postal revenues, for the fiscal year ended June 30, 1910, as $707,186,007. See also combined statement Treasury Dept. June 30, 1910.

COPY
PAGE BOUND VERTICAL IN BOOK

It will be noted that the bonds and stocks of all the railways amount to $18,890,850,293. The commercial value of these railways as determined by the Census Bureau in 1904 was $11,244,852,000, (Bulletin No. 21, p. 7) indicating an appallingly excessive capitalization, but which appears insignificant when compared with the fictitious values arrived at in these cases. It is easily seen how conservative was the statement of the Interstate Commerce Commission as to the results which must follow the adoption of any such method for arriving at the proper basis for rates.

The comparisons made in the foregoing table, are, of course, upon the presumption that reproduction cost, will upon the average, bear the same relation to capitalization throughout the country, as found by the Master, upon the three roads here. That, we submit, is by no means a violent assumption. An equally exaggerated claim was made by the Burlington road in the Western Advance Cases and we have no doubt that the owners of every other railway will be alert to take advantage of the opportunity which the method affords for claiming excessive values.

Whether the Basis so Adopted is Justified is Purely a Question of Law.

For this reason we have refrained as far as possible, from discussing unit prices, and from comparisons as to the testimony produced by the respective parties. Unless complainants' witnesses were justified in assuming increased unit prices

POOR C

because of the assumed necessity of reconstructions, the unit prices found cannot be accepted, and unless cost of reproduction new, as here applied and adopted, *as a matter of law* establishes present value, which in turn is to be taken, *in law* as the sole and proper basis for rates, the entire valuation must fall.

If the theory or method itself is approved of as a matter of law, the courts will, to some extent, be helpless, as the formula permits the indulgence in almost any fantastical presumption, resulting in the accentuation of every evil connected with opinion and expert testimony.

With the utmost respect, we submit that the entire method is "theory run mad," and we press upon the attention of this Court what it means to the public welfare, if, practically over night,—by a series of mere assumptions—the basis for rates is thus exaggerated.

IV.

INTERFERENCE WITH THE FEDERAL COMMERCE POWER.

The decrees appealed from hold, in each suit, that the rates involved "operate as a burden upon, and an interference with, a regulation of, and an unjust discrimination against commerce between the states."

This sweeping condemnation would indicate that in prescribing the rates in controversy the state flagrantly usurped authority over interstate commerce, and undertook to directly regulate the same.

It is, however, conceded by both counsel for the railroad companies and the trial court, that each rate challenged is limited in its application to transportation beginning and ending in the state, and that neither of the laws or orders prescribing the rates, by its terms requires any carrier to do or refrain from doing anything with reference to its *interstate* business.

It is alleged in the several bills of complaint and is conceded by the state in these suits, that prior to the making he rates here involved the carriers had been permitted to make their own tariffs in this and some of the adjoining states, for both interstate and intrastate business.

All freight is transported by weight and not according to the cubical car space it occupies, and therefore after the subjects of transportation have been classified so that articles of like kind shall take the same rate, the only other considerations

in rate making are the weight of the article, and the distance it is to be carried. State lines, except so far as they limit governmental power, have nothing to do with rate making.

It is a matter of which the Court will take judicial notice that the *ton mile* rate on any shipment decreases with distance, at least up to the point where the maximum economy arising from the element of distance, is reached. The point in a haul beyond which distance does not warrant a reduction of the ton mile rate, was suggested in these cases to be about 200 miles, but there was no satisfactory evidence offered on the subject. This variation in the ton mile rate is technically called the "progression" of the rate. The rates involved here terminate at the state line, but their rate of progression is in no case modified by reason of the nearness to the state line of the point of origin of a shipment, they are symmetrically based on weight and distance.

The companies have used the same tariff between points in Minnesota and North Dakota, as between points both of which were in Minnesota; but interstate rates to points more remote have been made on a different plan, and on different rates of progression.

Each shipment is an entirety, and the rate for any given part of the haul can only be ascertained by taking the entire charge and apportioning it on a mileage pro rata basis over the entire haul. That is the rule universally followed by railroads in determining the amount of interstate earnings in any

given state. (Page 984, Vol. 3, Record Case No. 600). Interstate hauls average much longer than intrastate. It follows that the use of the same tariffs for interstate and intrastate business does not establish the same *rates* on the two classes, because the rule by which the ton mile rate diminishes with distance, inevitably makes the state proportional of the rate on a longer interstate haul less than the intrastate rate for freight carried the same distance within the state.

INSTANCES.

To illustrate let us take the tariff sheet, Exhibit 46 Maguire, Vol. 6, Record No. 600.

This exhibit gives the terminal and "distance" rates westerly from Duluth across Minnesota and a portion of North Dakota. It also shows the "progressions" or diminutions of the *ton mile* rate, as distances increase, up to 60 miles. The longest haul in Minnesota on that line is to East Grand Forks (same as Grand Forks), 300 miles, for which haul the first class terminal intrastate rate is 79 cents per cwt. Under the same tariff the first class terminal *interstate* rate for 600 miles to Ray, North Dakota, is $1.36 per cwt. On a shipment of first class merchandise from Duluth to Ray, the *interstate rate* in Minnesota would be one half of the total rate, or 68 cents per cwt., *which is only* 86 *per cent of the intrastate rate* for hauling the same shipment *the same distance in Minnesota.* If

POOR CO

we take a shipment for 25 miles from Duluth the intrastate "distance" rate is 19 cents per cwt.; on a shipment from Crookston, Minnesota, 25 miles from the state line, to Ray, North Dakota, a distance of 325 miles, the straight "distance" rate would be 88 cents per cwt., of which one twelfth—7.33 cents—would be the *rate* in Minnesota, which is less than one half of the intrastate rate for *a twenty five mile intrastate haul under the same tariff*. The carload lumber rate between Moorhead on the Western boundary of the state and Saint Paul—being the rate for a distance of 250 miles—under the commodity tariff in controversy, (classification No. 13, pages 153-4, record Vol. 1, Case No. 599), is 11.8 cents per cwt. or 9.4 mills per ton mile.

The carload lumber rate on the Great Northern road from the Pacific Coast, through Moorhead to Saint Paul is 45 cents per cwt. or 4.5 mills per ton mile, which latter is the *interstate rate* in Minnesota on that business. (Page 1128, Vol. 3, record case No. 600). It appears (page 218, Vol. 2, record No. 601) that Albert Lea and Chaska are stations on the Minneapolis & St. Louis Road, 85 miles apart, and that the rate on soft coal from Peoria, Ill., to Chaska is $1.40 per ton, of which the Minnesota proportion for the 85 miles from Albert Lea is 42 cents per ton. The Minnesota intrastate rate on soft coal for a haul of 85 miles (classification 17 commodity schedule supra) is 75 cents per ton.

The learned trial Court (page 352, Vol. 1 record, Case No. 600) declared that the rule of diminution

OPY

in the ton mile rate for greater distances was "a cardinal principle of rate making."

If that be true it is entirely clear that interstate and intrastate rates cannot in the nature of things be related, because the principle referred to, operating on the rate for each shipment, gives such a variety of interstate rates within a state that they are not only not related to intrastate rates earned under the same schedule, but they are absolutely unrelated to each other.

It would, therefore, be utterly impossible for intrastate rates to "harmonize" with interstate rates in the state; some of the rates on each class may be the same, and as was the case when the instant rates were prescribed, some interstate rates may be higher, but by far the greater number of interstate rates even under the old tariffs of the companies, were much lower than the intrastate rates here complained of.

The practice of the railroads, however, in making their intrastate, and short distance interstate rates the same, resulted in establishing identical rates between certain small cities situated on opposite sides of the Red River of the North—forming the boundary between Minnesota and North Dakota—and the Twin Cities, and between the same trading points and the cities of Duluth and Superior, situated on opposite sides of the Eastern boundary of the state.

The schedules here involved prescribing rates for *intrastate* business different from and somewhat lower than the rates theretofore maintained by the

companies for that business, necessarily disturbed the equilibrium theretofore existing between the rates on the two classes of business on the boundary lines. But while the rates from distributing centers in the state to internal border stations were thus made lower than existing interstate rates from the same centers to external border stations, it by no means follows, as shown above, that the intrastate rates, as a state proposition, were made lower than Minnesota interstate rates.

Such consequence would be immaterial from a legal standpoint, but in view of the many insinuations contained in the record characterizing the state's action in prescribing these schedules as radical, the moderation of the state's action will be better understood when attention is called to the fact that the rates involved here were not only in the instances mentioned above, but generally, very much higher than the rates upon which the Minnesota interstate business as a class was carried by the companies, during the time that these rates were in force, although the latter rates were made by the companies themselves.

The rate at which an individual shipment in either class moves has little to do with determining the level of the rates on that class of businss. The relative rate level, and the relative revenue producing power of the rates on the two classes of business can only be determined by comparing their relative ton mile revenues in the state, for a given period. That comparison was made in exhibits offered by the complainants, and as we have here-

tofore pointed out, the Master found as a fact (page 267, Vol. 1, Record, case No. 599) that with all the rates in controversy (except commodity) in effect, the relative ton mile revenue in the state on intrastate and interstate freight business for the year 1908 was, on the Great Northern as 2.02 to 1, and on the Northern Pacific as 1.43 to 1; that is, on the Great Northern road intrastate freight business as a class produced 102 per cent more revenue per ton mile, and on the Northern Pacific intrastate business produced 43 per cent more revenue per ton mile, than the Minnesota interstate. No showing on this subject was made as to the Minneapolis & Saint Louis road.

Interference With Federal Power.

But because of the differences produced by these tariffs in the rates between Minnesota distributing centers and internal stations on the boundaries, and the interstate rates made by the companies themselves between the same distributing centers and external stations on the boundaries, the carriers claim that the observance of these rates compelled the readjustment of the interstate rates to and from such external boundary stations, so as to make the same rates to the stations on both sides of the lines, not because of any provisions of the Minnesota laws or the orders by which the rates were prescribed, but because of the prohibitions against discrimination between localities, contained in the *interstate commerce act*.

This is the principal way in which they claim the federal commerce power was invaded, and interstate rates "regulated" and "burdened" by the rates complained of. They further claim, however, that other interstate rates to points more remote from the boundary will be affected by a rule of transportation which prevents any through rate being greater than the sum of the locals. They claim they will be required to reduce all interstate rates which, after the adoption of these schedules, might be higher than the sum of the locals.

They also claim generally (paragraph 8, bill of complaint, Record, Vol. 1, case No. 599, page 131) that the provision of the interstate commerce law forbidding discrimination between localities applies to all *intrastate* as well as to all interstate transportation, and requires the maintenance of harmony and due proportion between interstate and intrastate rates wherever the *local* conditions affecting transportation of both classes of business are similar.

TRANSPORTATION DISTRICTS.

They declare that they have accordingly formed the territory served by them into *transportation districts* comprising groups of adjacent states having similar natural products, in which the same tariffs have been applied to all business local to such districts, regardless of classification or state lines.

But commerce was not classified as interstate and intrastate because of the similarity or dissimilarity

of its physical characteristics; it was so classified solely with reference to the division of control over it, between the Nation and the States.

Neither of the sovereignties would have jurisdiction over the commerce, considered as a common mass, in a *district* including several states. The government was not organized by the people along lines which permit the segregating of states into groups for any purpose, and the question here is not whether a different plan would have been better, or whether the states ought to have been abolished, the question is whether this state as constitutionally established, has exceeded its authority in assuming to regulate its domestic commerce.

They further claim that under the interstate commerce law, as the same has been recently construed by this Court, interstate rates can only be condemned as unreasonable by the interstate commerce commission, and that an original inquiry into the subject is beyond the power of any court, either state or federal. As a consequence they claim that interstate rates within a transportation district, regardless of their inherent reasonableness, are an immutable standard with which intrastate rates in the same district must *harmonize*, and until the interstate commerce commission *changes the standard*, intrastate rates out of harmony therewith are void, no matter how just and reasonable they may be in and of themselves as applied to the intrastate business within a state.

The foregoing contentions presented on behalf of the railway companies, constituting a perfect

scheme for the *prevention of the regulation of intrastate commerce,* were upheld by the Master, and in turn by the trial court in these suits.

At page 216, Vol. 1 (No. 599) the Master, in his report, says:

> "The foregoing findings of fact with respect to the effect of the prescribed rates upon interstate commerce * * * are made without regard to the justness or otherwise *in fact* of the interstate rates affected by the local rates, and as this can be determined only by congress or its administrative agent the interstate commerce commission * * * the court cannot in this suit determine the reasonableness of the interstate rates. * * * Interference with interstate commerce arises from the fact that to prevent *discrimination* the rates must be modified so as to correspond substantially with the state made rates, and from the further fact that interstate commerce cannot in general be maintained at all unless they are so modified. It was directly held in L. & N. Ry. Co. v. Eubank, 184 U. S. 27, that the carrier cannot be compelled to adjust its interstate rates with reference to state rates, and *since they must harmonize* to prevent unjust discrimination and to enable the carrier to retain interstate business, *the state in its regulation of rates must do so with reference to their effect on interstate commerce.*"

The above view of the Master as to both the law and the facts is upheld by the trial court in substance and effect in its opinion at page 410 of the same volume.

The trial court even went to the extent of holding that the requirement as to harmony of rates upon the two classes of business is so controlling that no change can be made in the rates on *either*

class without a similar change in the rates on the other. In its opinion, at page 413 of the same volume, the learned trial Court said:

> "The fares and rates and the traffic in intrastate commerce were so inextricably interwoven with the fares and rates and the traffic in interstate commerce that general and substantial reduction of the fares and rates in either, by its necessary operation compelled a similar reduction in the other, *because the interstate commerce act forbids the discrimination that would otherwise result, and because traffic will move only on the lowest available rate.*"

In defining the federal commerce power, the court said in its opinion, (page 411, same volume):

> "The power therefore to prohibit the railroad companies from making *or permitting* any undue discrimination between localities and parties by unreasonable differences between *interstate* and *intrastate* rates *was vested in congress*, and no acts or orders of the state or its officers could justify such a discrimination."

It will be seen from the foregoing excerpt, that congress, according to the court's conception, not only has power to prohibit railroad companies from making intrastate rates different from interstate rates, but it may also prohibit them from *permitting* such rates to be made by a state. Under this theory the state would not only be divested of control over internal commerce, but the railroads would be charged with the duty of keeping the state under proper surveillance.

After expressing approval of the plan which the railroads claimed to have followed in dividing the territory served by them into districts comprising

several states or parts of states, for rate-making purposes in both their interstate and intrastate business, the Court said (page 391, same volume):

> "Any substantial change in the basis of rates thus established and in force or in any particular rate, due only to the fact that the transportation was *interstate, or that it was local to a state*, would have been actual, undue and unjust discrimination in fact, and any substantial difference in rates for the transportation of passengers, merchandise or commodities maintained by either of said companies as between traffic *local to the state*, and traffic which goes between the state of Minnesota and either of its neighboring states, will constitute actual undue and unjust discrimination in fact."

The group of states the Court had in mind in the above excerpt, as shown by the language immediately preceding that quoted, comprised Wisconsin, Minnesota, North and South Dakota. However, in its decree based upon that opinion, the Court prohibited the two-cent passenger rate in Minnesota, and caused the restoration of the three-cent rate, although it was conceded that the maximum passenger rate in Wisconsin on the East, and in Iowa on the South of Minnesota was and for several years had been but two cents, and the maximum passenger rate in sparsely settled North Dakota on the west was but two and one-half cents per mile.

Under the theory the trial Court professed to be following, the decrees in these suits, instead of preventing discrimination, created the most flagrant discrimination in passenger fares, when compared either with interstate fares or the local fares

in adjacent states. The same effect though in less striking form, was brought about in merchandise class rates.

If harmony in rates and fares in the two classes of commerce is necessary in transportation districts as declared by the learned Court below, the intrastate rates and fares in Minnesota *restored by the decrees appealed from*, being so much higher than the rates and fares in adjacent states, would constitute an insurmountable barrier in the pathway of interstate commerce.

In referring to the contentions of counsel for the state in reference to the alleged conflict between federal and state authority, the learned trial Court said (page 410, same volume):

> "Counsel for defendants argue, however, that this radical discrimination is not forbidden by the interstate commerce law because it is a discrimination wrought, not by an undue difference between intrastate rates of which they say the state has exclusive jurisdiction, nor by an undue difference between interstate rates, of which they admit the nation has exclusive jurisdiction, but by an undue difference between intrastate rates and interstate rates, and they contend that over the discrimination thus wrought neither state nor nation has any power. The argument, however, again disregards *the broad and fundamental difference between the power of the state over intrastate commerce and the power of the nation over interstate commerce.* The state may regulate its intrastate commerce so far only as the exercise of its power does not substantially burden or regulate or discriminate against interstate commerce, but no farther. A state may not prohibit or regulate discrimination between interstate and intra-

state rates in such a way as substantially to burden or regulate interstate commerce, as, for instance, by the prohibition of a higher rate for a short haul wholly within the state than for a long haul that includes the short haul and extends into another state, because such action burdens and regulates interstate commerce. Louisville & Nashville Ry. Co. v. Eubank, 184 U. S. 27, 42-3. By the same mark, because it is a direct regulation of interstate commerce, the *Nation may* regulate and prohibit discrimination wrought by an undue difference between interstate and intrastate rates, although such regulation or prohibition may also to some extent affect and regulate intrastate commerce. For to the extent necessary completely and effectually to regulate interstate commerce, the nation by *the Congress and its Courts* may affect and regulate intrastate commerce."

The Court said (page 411, same volume):

"But counsel insist that, if congress had the power to forbid this discrimination, it did not exercise it because it declared in the proviso to Section 1 that the provisions of the interstate commerce act should not apply to transportation wholly within one state. But the main object of the act was to prevent every undue discrimination between parties and between localities. * * * It has, as we have seen ample authority to forbid discriminations wrought by differences between intrastate and interstate rates, but none to prohibit discriminations wholly within a state. The act prohibits any undue discrimination in any respect whatever between localities under similar circumstances and conditions *by any common carrier subject to its provisions.*"

Many of the propositions of law thus laid down by the learned trial Court in its opinion, not only have never before received judicial sanction, but

are, it seems to us, in direct conflict with the terms of the federal constitution, as the same has been interpreted and expounded by this Court.

The most striking of such original propositions of law are:

1. That in addition to its plenary power of control over interstate commerce, Congress also has power to prescribe the standards and rules for the regulation of intrastate commerce, so as to prevent intrastate rates from indirectly affecting interstate rates.

2. That notwithstanding the express declaration of the interstate commerce act that its provisions do not apply to intrastate commerce, it does nevertheless so apply, and in such application it amounts to an exercise by Congress of its *power* over intrastate commerce.

3. That differences between interstate and intrastate rates amount to discrimination between localities as the same is prohibited by the interstate commerce act, though the *intrastate rates be prescribed by public authority* and the interstate rates be fixed *by the carriers themselves*, without regard to the inherent reasonableness or unreasonableness of either set of rates as to the traffic to which they apply, and in all such cases the intrastate rates are void.

4. That under the interstate commerce law, railroads have such a vested right to the inviolable enjoyment of interstate rates fixed by themselves *regardless of their inherent reasonableness*, that they may under the plea of discrimination between localities, prevent a state from fixing *fair and reasonable rates for its internal commerce*, if such reasonable intrastate rates differ from, and might therefore *indirectly* menace the continuation of, the interstate rates made by the carriers.

5. That courts have power over the making and adjustment of rates other than that necessary for the protection of the property of the carriers from confiscation, or from rates than can be judicially said to be unreasonably low.

6. That the *indirect* or incidental effect of state made rates on interstate rates may amount to unconstitutional "interference," *if it is substantial in degree,* and the extent of such indirect effect, and whether it is *sufficient in degree to be unconstitutional* must be determined by the court *as a question of fact* whenever it is raised.

As the upholding of these contentions would entirely destroy the power of the states over their purely internal commerce, and practically overthrow our dual system of government, we beg leave before more specifically discussing the errors in the opinion of the trial Court to briefly refer to the question of the relative commerce powers of the states and the nation.

Division of Sovereign Power Between Nation and States.

It is unnecessary before this learned Court to advert to the plan upon which the sovereignty was divided when the federal republic was formed. That plan has been discussed, and the manner in which it was carried out in the federal constitution elucidated in so many exhaustive opinions by this Court, that so far as they affect the issues in these suits they have all been authoritatively settled. We are wholly unable to reconcile the plainly ex-

pressed views of this court in the opinions referred to, with the interpretation sought to be given to the federal constitution by the learned trial court in the decision of these cases. It is well known that when the federal constitution was in the making a proposition to give entire control over commerce to the federal government was rejected. Commerce is so naturally and completely dvisable into interstate and intrastate, that it would have been a departure from the line of cleavage followed in dividing the powers of government between the two sovereignties, to have given to congress control over a subject so essentially local as the internal commerce of a state. But if commerce had not been considered completely divisible on unmistakeable lines, its division, and the assignment of jurisdiction over a part thereof to each sovereignty would not have been attempted. The establishment of efficient control over commerce was one of the primary purposes of the constitution makers, and it is unfair to the memories of the men whose genius in the preparation of that instrument has challenged the admiration of the world for more than a century, to say that on one of the most important subjects considered by them, they envolved a plan so hopelessly inefficient and conflicting as the one outlined in the opinion of the trial Court in these suits. As a matter of fact when control over interstate and foreign commerce was given to the federal government by the Commerce Clause of the Federal Constitution, there was no doubt as to the extent of the jurisdiction so conferred. No serious

question can arise as to what constitutes interstate or foreign commerce, so far as its transportation is concerned. The points of origin and destination of the transportation determine the question, and the jurisdiction attaches accordingly. But the commerce which was neither interstate nor foreign, that is the part carried on wholly within a state, was not touched by the federal constitution. Control over it was left where it was before in the states, and that control was neither increased nor diminished. The constitution makers cannot be suspected of intending to make the control over one class of commerce less efficient than the control over the other. The commerce carried on between states has no inherent attribute of superiority over that carried on within states. Both are handled indiscriminately in trade, and the cost of the transportation of both is paid by the same people. Extortionate rates and unfair practices are just as possible, and just as oppressive in intrastate as in interstate commerce, and it must have been the purpose to safeguard the rights of the people as effectually in respect to the one as in respect to the other.

Neither did the constitution makers intend to invest the sovereignties with different dignities; they simply intended to divide the powers of government between them in such a way that both could operate at the same time in the same field upon the same persons and property, without conflict, or disparagement of the powers of either. Under the dual plan such harmonious co-

ordinate operation is necessary to efficient government. "Sovereignty" means complete governmental power, and therefore the sovereignty of a state to the extent that it exists, is of the same character and dignity as the sovereignty of the nation. The nation and the states were not invested with different kinds of sovereignty, but with different parts of the same sovereignty; they were not expected to carry on different kinds of government, but different parts of the same government.

The constitution and valid laws of the nation "are the supreme law of the land," not because they are inherently of a higher order than laws made by a state, but because they prevail in every state, are the exclusive laws on the subjects to which they apply, and because to prevent the possibility of overlapping and to establish uniformity it was wisely provided that wherever one power or the other must give way, the authority of the general government must prevail. But within its own borders, the valid laws of a state are, in that territory and as to the subjects to which they apply, the exclusive and supreme law of the land, and any federal law which applies to a subject within the jurisdiction of a state is invalid.

Innumerable state laws have been declared unconstitutional because they applied to subjects within the federal jurisdiction, and with the same uniformity federal laws have been overthrown when they applied to subjects of state jurisdiction. A few conspicuous examples of the latter are:

Trade Mark cases, 100 U. S., 82;

Ill. Cent. R. Co. v. McKendree, 203 U. S., 514;
Howard v. Ill. Cent. R. Co., 207 U. S., 463.

All of the above federal laws were held invalid because they assumed to regulate intrastate commerce, and in the case last cited, to the suggestion that the federal commerce power extended to all the affairs of a railroad if any part of its business was interstate, Mr. Chief Justice White said:

> "It assumes that because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the constitution; in other words, with power to legislate concerning matters of purely state concern." * * * "It is apparent that if the proposition were well founded, it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters, which from the beginning have been and must continue to be under their control, as long as the constitution endures."

The interstate commerce act, and the laws and orders prescribing these rates are in exact harmony with the constitutional classification of commerce; the federal act providing by its terms that it does not apply to commerce wholly within a state, and the tariffs here involved providing by their terms that they apply only to business beginning and ending in the state.

No student of our poltical system questions the correctness of the language of Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 194, where, referring to the federal commerce power he said:

> "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledged no limitations other than are prescribed in the constitution."

But the learned judge also said in that opinion as to the commerce power of the states:

> "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state and which does not extend to or affect other states."

The foregoing language as to the respective commerce power of the nation and states has frequently since been quoted with approval by this Court.

The learned trial Court declared in its opinion, that there is a "broad and fundamental difference between the power of the state over intrastate commerce, and the power of the nation over interstate commerce."

This Court said, to the contrary, in Sands v. Manistee R. I. Co., 123 U. S., 288, 295:

> "The internal commerce of a state—that is the commerce which is wholly confined within its limits—is as much under its control, as foreign or interstate commerce is under the control of the general government."

This doctrine has since been so uniformly and frequently repeated by this Court that it is altogether unnecessary to assemble further authorities upon it.

The learned trial Court further declared, supra:

> "For to the extent necessary completely and effectually, to regulate interstate commerce,

the nation by its congress *and its courts* may *affect and regulate* intrastate commerce."

If control over *intrastate* commerce is necessary to the complete and effectual regulation of *interstate* commerce, there would seem to be no escape from the correctness of the foregoing statement so far as it relates to congress, even though the result would be to rob the states of their commerce powers, and make the constitutional classification of, and division of control over commerce a farce. The completeness of the federal power wherever it exists at all, is indispensable to the maintenance of our system.

But congress needs no control over the internal commerce of the states in order to perform its functions with reference to interstate commerce, and if it may usurp one state function it may usurp all.

DIFFERENCE BETWEEN INTERSTATE AND INTRASTATE COMMERCE. SAFETY APPLIANCE DECISION.

This Court recently held that the federal law as to safety appliances extends to all interstate railroads and the cars and trains operated thereon, whether such cars and trains be engaged in carrying interstate or intrastate commerce. There can be no question of the soundness of that decision. Railroads and the cars and trains operated thereon are not commerce; they are the instrumentalities, vehicles and highways of commerce, and control over them is necessarily incidental to the control

over commerce itself. But transportation, which constitutes commerce so far as a railroad is concerned, does not derive its character as interstate or intrastate, from the extent of the railroad over which it is carried, nor from the points of origin and destination of the train, but solely from the point of origin and destination of the shipment itself. The cars and engines used on a highway of interstate commerce, whichever class of commerce they carry, must operate in harmony with all other cars and engines thereon to avoid physical collision, destruction of life and property, and obstruction of the way. Control of the equipment to be used on a highway of interstate commerce is therefore distinctively a federal power.

The two classes of *commerce* however are carried on within different orbits which do not cross or overlap. It is the *way bill* of the shipment or the *ticket* of the passenger that determines the class of commerce to which the transportation belongs; in other words the two classes of commerce are created and kept separate *by the contracts upon which they are carried.* Each passenger and each shipment starts from a station for a definite destination; the compensation is fixed and the contract which determines the classification is made in advance in writing, becomes a part of the records of the carrier, and thus the two classes of business—though both may be carried in the same car—remain as distinct from each other as if the business was carried on separate trains. The rate charged upon any shipment is a matter of utter indifference

to the railroad company, except so far as it affects its revenues. The transportation contract is made by the agent at the initial station, and the cost is generally paid in advance. Where not so paid on freight shipments, it is collected according to the initial contract at the point of destination and no other employee engaged in carrying it knows or cares what the rate is. It is as easy for the agent making the way bill to insert one rate as another.

The fact that differences in rates do not affect the convenience of the carriers, or interfere with the harmonious carrying on of their business is illustrated all over the country by the numerous disparities in rates which the companies insist upon making, and which would be discriminatory were it not for the differences in the conditions affecting the service. The striking discrepancies between different classes of interstate rates in Minnesota to which we have above adverted, all show that harmony in rates is a matter of indifference from a railroad standpoint, and it is a matter of common knowledge that harmony in rates does not exist, except where compelled by vigilant public supervision.

Cars are loaded and trains made up with reference only to the physical characteristics of the freight and its destination, and with no regard to the rates thereon.

When the learned trial court stated therefore, in the foregoing excerpt from his opinion, that the intrastate rates and fares involved in these suits were "inextricably interwoven" with interstate

fares and rates in the same field, it is hard to understand what he meant. He surely could not have thought that because shipments belonging to the different classes were carried in the same car or on the same train they were carried on the same way bills.

Where, as must be the case, there is a way bill issued for each shipment no matter how small or how large the shipment may be, when the quantity shipped is less than a car load, it makes not the slightest difference whether the remaining space in the car is occupied by a shipment of the same class of commerce or not. Neither shipment can lose its identity, and the rate paid upon its contents has nothing whatever to do with the movement of the car.

No conflict is possible between the two sovereignties on account of regulations of the *different classes of commerce,* because they are wholly distinct from each other; on the other hand conflict would be inevitable if there were diverse control of the vehicles to be used on a highway of interstate commerce.

This Court Has Held the Two Classes to be Distinct.

It was in accordance with the theory of the complete separation of the two classes of commerce that this Court so often held that the reasonableness of rates on either class must be determined without reference to the rates or earnings of the carrier on the other class. If the rates and fares in

the two classes become "inextricably interwoven" with each other as stated by the trial court, the task of considering them separately would be an impossible one.

In M. & St. L. Ry. Co. v. Minnesota, 186 U. S., 257, this Court said:

> "The reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons or property wholly within its limits must be determined without reference to the interstate business of the carrier, or the profits derived from it, but it by no means follows that the companies are entitled to earn the same percentage of profit on all classes of freight carried."

At page 415, Vol. 1, Record (No. 599), the trial judge, by what seems to us strange inconsistency, enunciates the same doctrine as that stated above. He holds in one branch of the case that the rates were void for conflict with the federal power, even though entirely just and reasonable per se, if out of harmony with interstate rates; that for the purpose of accentuating the conflict, interstate and intrastate business regardless of way-billing, must be considered as constituting a homogeneous common mass. In the next breath he declared that the two classes of business are distinct, and in inquiring into the question of the inherent reasonableness of the rates, each class must be considered by itself.

What Constitutes Discrimination Between Localities as Forbidden by the Interstate Commerce Law?

As we have seen, under the fundamental plan of the government, the federal commerce power applies only to *interstate* commerce. Congress could not if it would either regulate or prevent the regulation of intrastate commerce. But congress has not usurped authority on the subject, because the interstate commerce act expressly excludes intrastate commerce from its provisions. Congress fully recognized the limitations upon its power, and the most glaring specific errors in the opinion of the court below are the findings that congress has power over intrastate commerce, and that by the enactment of the federal commerce law *it had exercised the power.* We are unable to follow a construction which makes the constitution and that statute mean the opposite of what they say.

Under the doctrine of the Employers' liability decision, and the other similar decisions cited above, the interstate commerce act would be void if it applied, as the trial court says that it does, to *intrastate commerce.*

In framing and adopting the federal constitution the people sought to avoid the undue centralization of power by leaving the local sovereignty with each state. Therefore in investing the national government with uniform authority everywhere within national territory, they limited its jurisdiction to questions affecting the common welfare of the people of *all states*, and expressly excluded from its jurisdiction questions affecting only the people of a single state. It is the duty of the Court, it seems to us, when construing the language of the constitution to keep in view the fact that it was the intention of the people that, under the dual plan the sovereignties should co-ordinate and not conflict in the performance of their respective functions. If they cannot be conducted harmoniously our constitutional system must be abandoned, but the conflict which would bring about such a dire result must be real and unavoidable, and not conflict arising from usurpation, or from the forced and unnatural construction of terms.

The question here is not one of the usurpation by the state of authority over a question committed to federal jurisdiction; the question is whether the state should be prevented by the nation, on the complaint of private interests from exercising a power which it concededly possesses. The power of the state sought to be abated is not one which it is claimed the federal sovereignty might properly exercise, because this court has said

in a recent case that if the power of the state over internal commerce were destroyed, it would leave that commerce free from governmental control.

In the case of M. P. R. Co. v. Kansas, 216 U. S. 262, a state regulation of intrastate commerce was assailed as an interference with federal power, on two grounds: First, because the road was chartered as an interstate road, and second, because the regulation in question required the operation of a train from an interior point to the boundary of the state where there was no station, in consequence of which the company claimed it would be obliged to run the train to the next station in an adjoining state where there were terminal facilities, thus making the train an interstate one. This Court, speaking through Mr. Chief Justice White said in reference to the charter claim:

> "But this simply confounds the distinction between state control over local traffic, and federal control over interstate traffic. To sustain the proposition would require it to be held *that the local traffic of the road was free from all governmental regulation*, unless at the same time it were held that the incorporation of the road had operated to extend the powers of the government of the United States to subjects which could not come within the authority of that government consistently with the constitution of the United States. Manifestly the mere fact that the charter of the road contemplated that it should be projected into several states did not change the nature and character of our constitutional system, and therefore did not destroy the power of Kansas over its domestic commerce, or operate to bring under the sway of the United States matters of local concern; and of course could not project the au-

thority of Kansas beyond its jurisdiction. The charter therefore left the road for which it provided subject, as to its purely local or state business to the authority of the respective states into which it was contemplated the road should go, and submitted the road as an entirety so far as its interstate commerce was concerned, to the controlling power conferred by the constitution on the government of the United States."

This Court further held that no interference with federal power arose from the fact that the train was required to operate to the state line, although this would oblige the company to either establsh an otherwise unnecessary station, or run the train to the next station in the adjoining state in order to obtain terminal facilities.

The Court held that as the operation of the train outside the state was *not required by the Kansas authorities*, such operation was voluntarily, and could not be considered *a direct interference with federal power.*

In these cases the trial Court entirely disregarded the opinion of this Court in the above case as to the consequences of preventing the exercise of the commerce power of the state, and the holding therein that the "interference" with federal power must be *direct* in order to be unlawful.

It clearly appears from the fundamental law of the land, as it was correctly interpreted by this Court in the above case that the strangulation of the power of the state would not extend the federal power so as to cover intrastate commerce. In other words these are not cases where it was necessary to prevent action by the state in order that the fed-

eral authority might be exerted, because the state's power being exclusive over the subject, if that power were overthrown it would leave intrastate commerce "free from all governmental regulation."

WHAT CONSTITUTES DISCRIMINATION BETWEEN LOCALITIES? WHO CAN RAISE THE QUESTION?

Governmental regulation of commerce finds its only justification in protecting *the rights of the people* against the oppressive and unjust practices of the carriers. Power over interstate commerce was not given to congress in order that the federal government might protect the carriers from the proper exercise of the police powers of the states. The provisions of the federal constitution for the protection of the carriers against the people are found in the *fifth* and the *fourteenth* amendments, which, among other things, impose limitations on the exercise of the regulatory powers of the federal and state governments.

The regulatory powers of the government can only be invoked by those having an interest in regulation; *the carriers can resist the exercise of those powers* in the courts only when they violate the constitutional provisions last referred to.

As was tersely said by this Court in the case of Railway Company v. Wellman, 143 U. S. 339, 344:

> "The legislature has power to fix rates, and the extent of judicial interference is protection against *unreasonable* rates."

The courts do not regulate commerce.

In Prentiss v. Atlantic Coast Line Co., 211 U. S.

210, 226, Mr. Justice Holmes, speaking for the Court, said:

> "The establishment of a rate is the making of a rule for the future and therefore is an act *legislative*, not judicial, in kind."

The prohibition against discrimination between localities contained in the interstate commerce act, is a part of the scheme for the *regulation* of that commerce, *for the benefit of the public*, and not for the benefit of the railroads.

The fundamental requirement of reasonableness applies to the rates on both classes of commerce and therefore arbitrary differences cannot exist without the rates on the one class or the other being *unreasonable*, and upon an ultimate test whichever is unreasonable must give way. While the regulatory power is exerted in part by each sovereignty, as both are agents and servants of the same people, whose purposes and policies are the same by whichever sovereignty they are carried out, no permanent injustice is to be feared on account of such differences. But if differences between *interstate* and *intrastate* rates could under any circumstances constitute prohibited discrimination, the complaint would have to be made by some individual or some community injured thereby; the claim could not be made *on behalf of the carriers*.

A railroad company, as we have seen, has no direct interest in the welfare of individuals or communities engaged in trade, nor in the *equality* of rates. The provision of the interstate commerce act requiring equality of rates, and condemning dis-

crimination, is subordinate to the controlling provision that all rates shall be reasonable. Every shipper is entitled to reasonable rates, and both shippers and communities are entitled to as good rates as other shippers or communities where the circumstances and conditions are similar. The power to prohibit discrimination is a highly essential part of the power of each sovereignty over the class of comerce committed to its supervision; without it there would be no way of securing equality of commercial opportunity to those similarly situated, and one of the principal purposes of commercial *regulation* would fail.

But under the interstate commerce act only arbitrary and wrongful discrimination in interstate rates between localities, is prohibited. If the *circumstances and conditions* affecting the transportation differ, the right to equality of rates ceases.

In the case of East Tenn. V. & G. Co. v. I. C. C., 181 U. S. 1, which was a suit to compel obedience to an order of the interstate commerce commission, this court fully considered and construed the third and fourth sections of the commerce act (the former being the discrimination section, and the latter the long and short haul section), and held that higher rates for shorter distances, permissible under section 4, are not discriminatory under section 3, unless they are excessive *per se*.

Speaking through Mr. Chief Justice White, of the kind of discrimination prohibited by the act, this Court said:

"In a supposed case, when in the first instance, upon an issue as to the violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply.

The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the *voluntary and wrongful* act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of the carriers."

See, also, I. C. Co. v. L. & N. Ry., 190 U. S. 284.

This Court held in the case of I. C. C. v. C. R. & I. Ry. Co., 218 U. S. 88, 110, that a railroad cannot raise the issue of discrimination between localities. In that case among other things the railroads claimed that the rates would protect and foster particular localities of production and distribution. Speaking through Mr. Justice McKenna this Court said of that contention:

"That the companies may complain of the reduction made by the Commission *so far as it affects their revenue* is one thing. To com-

> plain of it *as it may affect shippers or trade centers is another.* We have said several times that we will not listen to a party who complains of *a grievance not his.* Clark v. Kansas City, 176 U. S. 114, 118; Smiley v. Kansas, 196 U. S. 447.

In these cases the claim of "discrimination" is interposed on behalf of the railroad companies, not on behalf of any individual or community affected. Not to secure the reduction of rates that are unreasonably high in and of themselves, but to prevent the reduction of intrastate rates regardless of their inherent reasonableness. It is an attempt on behalf of the carriers to prevent the exercise of the governmental power designed to secure *reasonable* rates for the public, by the perversion and reversal of the power designed to secure *equal* rates *for the public.*

It is a scheme for turning the machinery for the *regulation* of rates into a device for preventing their regulation.

The plea of discrimination between localities is interposed to prevent the state from establishing reasonable intrastate rates until the interstate commerce commission shall see fit to change existing unreasonable interstate rates. We call the interstate rates unreasonable, because their reasonableness was wholly disregarded by the trial court and because the rates in controversy from which they differ *are presumed to be reasonable* until impeached by clear proof.

This scheme of the carriers to control the government, and prevent the exercise of its power

over commerce by thus arraying one sovereignty against the other is so absurd that we would treat it as ludicrous were it not for the solemn judgment of the trial court upholding it. The first proposition upon which it rests is that, contrary to the language of the Commerce Clause, congress has *power over intrastate commerce*, and the second is that, contrary to the terms of the interstate commerce act, congress has exercised such power.

In other words that which is not *malum in se*, has been made *malum prohibitum* by the unexpressed exercise of a non existent power.

In the decision of this Court defining discrimination above referred to it is declared that in order to be unlawfully discriminatory under the interstate commerce act the *interstate rates* complained of, must result from the *voluntary and wrongful act of the carrier*. The rates here claimed to be discriminatory were made by or under the laws of a state for the transportation of business wholly within its borders; the carriers had nothing to do with making them, and no discretion as to obeying them, unless they were confiscatory. The basis of discrimination between localities is disparity in rates on the same class of traffic, wrongfully and voluntarily made *by the carrier* under *similar circumstances and conditions*.

Intrastate commerce begins and ends in a state, while interstate commerce, as to each state means all transportation between it and *all other states of the union*. It is merely begging the question to say that conditions affecting transportation may

be similar in two states, or in a small group of states, and that that fact justifies—as a practical question—harmonious interstate and intrastate rates. If the whole plan of our government did not make the suggestion absurd, and if this Court had rate-making powers and the question were properly here for consideration, it would be a sufficient answer to say that *interstate business has a nation wide character*, and is not confined to transportation between adjacent states. The products of every state are transported to and are to be found in, every other state, and when considering the "circumstances and conditions" of the traffic interstate business must be considered *as a class*, and intrastate as a class. It is utterly impossible that the "circumstances and conditions" affecting interstate business as a class could be at all similar to those affecting transportation within a single state, and therefore even if the federal jurisdiction extended to both, discrimination in the rates on the two classes could not be predicated on mere differences ignoring the widely differing circumstances and conditions. As we have shown in these suits, a few interstate rates were higher than the rates here involved, but the great bulk of the interstate rates—that is the proportion assignable to the state—were lower. In every state under schedules constructed according to the ordinary plans the interstate proportionals must be lower than the local rates. If the new use sought to be made of the claim of "discrimination" in these suits, can be upheld in favor of the *railroads* as to the interstate

rates that were higher, it could also be invoked in favor of the intrastate shippers, as to the interstate rates that were lower. The intrastate rates cannot at the same time harmonize with higher and lower interstate rates.

In Sanders v. Southern Express Co., 18 Int. Com. Repts. 415, and in other cases the interstate commerce commission held that "discrimination" under the interstate commerce law cannot be predicated on differences between interstate and intrastate rates, one of the reasons being that obedience to a state law by a carrier cannot be said to be voluntary.

In Woodside v. Tonopah & G. R. Co., 184 Fed. 360, the Circuit Court of the District of Nevada, having before it this identical question, said:

> "A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful or discriminatory because it may conflict with some rate fixed by a railroad company for interstate traffic. Upon adjustment the latter must yield."

If, as claimed by the trial Court, interstate rates that have been duly *filed* with the federal commission, are immune from attack by any power but the Commission, and are immune from the "interference" arising from lower competitive rates, it necessarily follows that a railroad company might plead threatened discrimination and interference with its interstate rates to prevent a *competing carrier* from voluntarily reducing its rates on either

class of business. The menace to existing interstate rates would be greater in such case than in the case of a change in intrastate rates by state authority.

In the case of Ames v. Union Pacific Ry., 64 Federal, 171, wherein the opinion was written by the late *Mr. Justice Brewer,* sitting at Circuit, this identical claim as to interference with the federal commerce power was made, and a number of instances identical in kind with those relied on here to sustain the claim, were cited. In disposing of the matter that learned Jurist said:

> "Again it is insisted that this act interferes with interstate commerce in two ways: first, it establishes a classification of freight different from that which prevails west of Chicago; and in the second place by reducing local rates, it necessarily reduces rates on interstate business. Neither of these objections seems to me to be well taken. * * * To say for instance, that because railroad companies have voluntarily placed flour in a certain class, on which a specified rate is to be charged, such voluntary act of mere classification destroys the power of the state to establish a classification which puts flour in another class and subject to another charge, is, to my mind *a most extravagant pretension.* Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true that the companies may, for their own convenience, to secure business or for any other reason, re-arrange their interstate rates and make them conform to the local rates prescribed by the state, but surely there is no legal compulsion. The statute of the state does not work a change in interstate rates any more than an act of congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effect of competition

between themselves and other companies, in restraint of the otherwise undeniable power of the state."

(The tenth paragraph of the bill of complaint in the Ames case was substantially the same as Paragraph 8, et seq. in the instant Northern Pacific Case—No. 599—appearing at page 131, et seq. Vol. 1 Record. As to identity of the evidence, see testimony of John E. Utt, commencing at page 409—Record Ames case.)

The trial Court cites the case of L. & N. Ry. Co. v. Eubank, 184 U. S. 27, 42, 43, in support of the argument that federal power over interstate commerce is different from and greater than the power of a state over intrastate commerce (page 410, Vol. 1, case No. 599) saying:

> "A state may not prohibit or regulate discrimination between interstate and intrastate rates, in such a way as substantially to burden or regulate interstate commerce, as, for instance, by the prohibition of a higher rate for a short haul wholly within the state than for a long haul that includes the short haul and extends into another state, because such action burdens and regulates interstate commerce. L. & N. Ry. Co. v. Eubank, Etc."

The Eubank case involved a provision of the constitution of Kentucky which in effect prohibited a higher rate for a short intrastate haul, than for a longer interstate haul, the shorter distance being contained within the longer.

This Court had previously held in the case of the same railway company against Kentucky, 183 U. S. 503, that the provision was valid when applied

as between places all of which were within the state. In the later case the provision was held to be invalid when the longer haul was interstate and the shorter intrastate. The specific parts of the opinion of this Court bearing on the invalidity were as follows:

> "The vice of the provision lies in the regulation of the rates between points wholly within the state, by rates which obtain between points outside of and those which are within the state. * * * But the fact which vitiates the provision is that it *compels* the carrier to regulate, adjust or fix his interstate rates with some reference at least, to his rates within the state, thus enabling the state * * * to directly affect, and in that way to regulate to some extent the interstate commerce of the carrier, which power of regulation the constitution of the United States gives to the federal congress."

It seems clear to us that the foregoing decision, instead of upholding the theory that rates upon the two classes must "harmonize," sustains the contrary view. It positively declares that there can be no legal relation fixed between the rates on the two classes. The thing condemned was the fixing of an *intrastate* rate by an *interstate* standard, holding that it would to some extent "regulate" interstate business if the carrier were required to fix interstate rates, with a view to their being used as a standard for intrastate rates. The thing which this Court there held could not be done, is the thing which the trial court in these cases held *must be done*, viz., the fixing of *intrastate* rates by an *interstate* standard.

A federal law requiring interstate rates to be fixed according to an intrastate standard would be equally void, because it would require the carrier to fix its intrastate rates in such case with some reference to their effect on interstate business.

The late Mr. Justice Brewer who announced the minority opinion in the Eubank case, said:

> "I do not suppose it will be seriously contended that the defendant can invalidate all the local rates which the legislature of Kentucky may see fit to enforce, by simply saying that outside of the state it somewhere touches a competitive point, and is forced to reduce its interstate rates by reason of the competition there existing."

PRESUMPTION OF REASONABLENESS OF RATES.

All rates are ultimately paid by the consuming public, and the public are for that reason fundamentally entitled to reasonable rates. No construction of the law intended to secure this condition, is justifiable, which results in preventing the establishment of reasonable rates. To say that the people of Minnesota or of any other state must indefinitely pay unreasonable rates upon their intrastate commerce, in order that a carrier may continue to enjoy unreasonable rates on its interstate business, is a proposition so abhorrent to reason and to the genius of our system of government, that to merely state it, is a sufficient argument against its soundness.

Although the trial Court made the impossible requirement of harmony between interstate and

intrastate rates, and the immunity of interstate rates from judicial interference, the bases of his decision on this branch of the case, he also attempted to invest the interstate rates with the merit of reasonableness by saying that inasmuch as they were filed with the interstate commerce commission as required by the federal law, they were "presumed" to be reasonable.

In its opinion, at page 413, Vol. 1, case 599, the trial Court said:

> "The railroad companies had established and were collecting their interstate rates and fares, pursuant to the act to regulate commerce enacted by the congress of the United States. Those fares and rates were lawful, hence *presumptively reasonable,* and neither the officers of the state of Minnesota nor any court, state or federal, could legally adjudge them unreasonable until they had been denounced by the interstate commerce commission. Texas & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426."

So far as the immunity of interstate rates from inquiry is concerned it will be noted that the Abilene Cotton Oil case was an action brought against the railroad company to recover money claimed to have been paid under extortionate rates upon interstate shipments. This Court held that under the federal law the interstate commerce commission was constituted a special tribunal having exclusive original jurisdiction of claims for restitution of moneys claimed to have been paid under unjust interstate rates, and that no action on such a claim could therefore be mantained, except to enforce the commission's finding.

Neither that nor any other decision of this Court ever held, however, that interstate rates were the standard for the fixing of intrastate rates, and that as such standard their reasonableness could not be inquired into.

The decision in the Abilene case was not based on the proposition that there is any presumption of reasonableness attaching to rates that have been made by the companies and merely filed with the commission.

In the subsequent case of Ill. Cent. R. R. Co. v. I. C. C., 206 U. S. 441, where a railroad company claimed the benefit of a presumption of reasonableness in favor of rates made by itself and duly filed, as against a complaint alleging them to be unreasonable, this Court, distinctly held, as it is concisely stated in the syllabus:

> "No presumption of law that a rate upon a particular commodity is reasonably low exists, because such rate has been duly published and filed by the carrier with the Interstate Commerce Commission."

There is no doubt that there would be a presumption of reasonableness existing in favor of interstate rates actually fixed by federal authority, simply because the act of establishing them was a governmental act within the jurisdiction of that sovereignty. But in that case, the presumption of reasonableness would apply to them *only as rates for interstate business*, and not as a standard for rates for *intrastate business* over which the federal government has no jurisdiction, and to which business the rates would not and could not apply.

The so-called presumption of reasonableness does not obtain *against* the rate-making power, it arises in its favor; but even if it existed assumptions as to interstate rates have no application to or bearing on the real point here involved, because we are here concerned only with *intrastate rates*, as applied to *intrastate* business.

The Court conceded that the rates here involved were presumed to be reasonable as to intrastate business. At page 416 of Vol. 1, Case No. 599, the Court said on this subject:

> "They are presumed to be reasonable and valid, because the legislature and the commission have the power to prescribe fares and rates of this nature on condition that they do not have the effect to deprive the owners of any property whose use is subjected to them, and the legal presumption is that the officers of the state have faithfully discharged their duties, and acted within the constitutional limits of their power."

But the trial Judge must have regarded the "presumption of reasonableness" very lightly. He gave it no force, declared that it was abrogated by the findings of the Master, and was superseded by a presumption that the Master's findings were correct, and he therefore overthrew the rates, and deprived the people of the state of their benefit because as he stated such a decision was necessary to *protect the interstate rates* of the companies.

INTERFERENCE IN FACT, THOUGH NOT IN LAW.

But besides the distortion of the interstate commerce act so as to make its provisions as to discrimination between localities apply to differences between interstate and intrastate rates, the court also held that the indirect effect of these rates upon the interstate rates of the companies was *interference in fact*, with the federal commerce power.

At page 412 of the volume last referred to, the learned Court says:

> "The reduction of local rates does not interfere with interstate rates as a matter of law, yet it may do so as a matter of fact."

At page 388 of the same volume, the Court says on this same subject:

> "It is the *effect*, and not *the terms or purpose* of state regulations of its local commerce that determine whether or not they so substantially burden interstate commerce that they violate the commercial clause of the constitution. *And this is a judicial question which each court must determine on its own responsibility on the special facts of each particular case.*"

This Court has said so often that it is unnecessary to refer to the decisions, that conflict between state and federal authority arises only where the interference of the one with the other is direct. The proposition is tersely stated in L. & N. Ry. Co. v. Kentucky, 183 U. S. 503, in these words:

> "Interference with the commercial power of the general government to be unlawful must be

direct, and not merely the incidental effect of enforcing the police power of a state."

See to same effect,

M. P. R. Co. v. Kansas, supra.

The rule making directness of the interference the test of its unlawfulness is imperative under our dual system, where the two sovereignties are constantly in operation, their jurisdictions touching, but not overlapping. If the indirect or remote effects of the laws of the one upon subjects within the jurisdiction of the other were held to constitute *interference*, no action could be taken by either on many subjects, without identical concurrent action by the other. This would be joining together powers which the constitution put asunder, and would destroy the ability of either sovereignty to perform its functions.

But the excerpts from the opinion of the trial court last above given show that the court held that indirect effects, though not amounting to interference with federal power "in law," might if "substantial" in degree, amount to interference "in fact," and thus be equally obnoxious to the federal constitution. Such indirect effects are, in the opinion of the court below, a subject for admeasurement by the court from the "special facts of each particular case," whenever such *interference* is alleged, and if the Court "on its own responsibility," finds the indirect effects to be *substantial*, it may find the state law to be unconstitutional, although *in law* the statute may be unimpeachable.

As *indirect interference* with interstate business can be *claimed* in any case, where a state law is distasteful, and interested witnesses will always make the claim under oath,—the above rule would abolish constitutional limitations, and make the power of a state in any case depend on the opinion of a court as to whether the power ought to be exercised. As there could be no possible basis for harmony of decision as to what constitutes substantial "interference in fact," the establishment of such a rule would amount to the erection of a judicial despotism, upon the ruins of our constitutional system.

The Court cites in support of the foregoing extraordinary proposition, the case of Ludwig v. Western Union Telegraph Company, 216 U. S. 1.

The question to be determined in that case was whether a license fee sought to be imposed on the telegraph company, as a condition of being permitted to continue its intrastate business, was a tax upon its interstate business and upon its property outside the state. The company was engaged in doing both interstate and intrastate business in Kansas and many other states. The proposed tax was to be based upon its entire capital stock, employed by it indiscriminately in all of its business, but the statute expressly declared that no tax was to be imposed on the company's *interstate business.* This Court construed the statute according to its express terms, and held that as the tax was measured by the company's entire capital, and not by the proportion thereof employed in Kansas, there

was no way in which it could be enforced without taxing the capital situated outside the state, and employed in the interstate business of the company. After finding that the interstate investment would inevitably be burdened by the tax, the Court in referring to the statement in the act that interstate business was not to be taxed thereby, said:

> "But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the constitutionality of the statute as shown by its necessary operation upon interestate commerce. If the statute reasonably interpreted, either directly or by its necessary operation burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted and although the company may do interstate and local business."

The court thus simply held that inasmuch as the statute could not be enforced according to its terms without burdening interstate commerce, such unavoidable consequence of its enforcement had the same effect upon its validity as if it had expressly provided for imposing such a tax, and that while *directly and necessarily* burdening interstate commerce, a declaration in the law that it was not doing so did not preclude the court from finding to the contrary.

There is nothing in the principle involved or in the language used in that case, that would uphold the doctrine enunciated above by the trial court in these cases, that indirect interference with the federal commerce power may be unconstitutional, de-

pending upon its degree, the latter to be determined as a question of fact by the court whenever the question is raised.

Because our rigid written constitutions have constituted the unyielding tests for determining the extent of the power of our respective sovereignties, this court has often declared that this is a government of laws and not of men. The interpretation of the constitution by the learned court, above outlined, would if upheld here, convert the government into one of *men* and not of *laws*.

When the regulations of its intrastate commerce by a state is challenged on the ground of *want of power to make the regulation*, there is but one question of fact involved, and that is the question whether by its terms the law is limited in its application to the commerce whose regulation is within the state's jurisdiction. When the validity of a tariff of rates for intrastate business is challenged as unreasonable or confiscatory the whole question is one of fact, and the consideration of the main question involves the determination of a large number of subordinate facts. When the regulation involved is of the highways or vehicles of commerce the Court is dealing with physical things which are capable of collision with one another, and many questions of fact may arise.

But the question of the power of a state to enact a law which by its terms plainly applies only to a subject within the states jurisdiction, must continue to be, as it always has been, *a question of law* to be determined solely from an inspection of the

constitution and the law itself, and the effect it will have in operation as manifested by the natural and reasonable meaning of the words employed therein.

There are of course many state laws which touch the subjects or vehicles of interstate commerce, such as quarantine and inspection laws, which do not assume to "regulate" the commerce of which they form a part, which have been held to be valid. It is unnecessary to either enumerate or comment upon them, as they have no bearing upon the questions here involved.

OPINIONS OF OTHER FEDERAL CIRCUIT COURTS.

An examination of the recent decisions of the Federal Courts in other jurisdictions shows that no misunderstanding exists as to the law on this subject as it has been heretofore laid down by this court.

In the case of Louisville & N. R. Co. v. Siler, 186 Fed. 176 (197), the learned Circuit Court, for the Eastern District of Kentucky had before it this identical question, involving rates made by the Railway Commission of that state. The facts in the case claimed by the railroad company, as stated by the court in the opinion, were:

> "A certain volume of interstate traffic, in corn, rye, barley, malt and other brewers' supplies, is constantly moving from points North of the Ohio River, through Covington or Newport, to some of the interior points named in the order. Some of this originates at Cincinnati, some further North. The existing

through rate from Cincinnati is and has been the same as the rate from those points to the Ohio River plus the rate south of the river. A car of rye from Cincinnati to Bardstown, Ky., is typical of this through traffic, and upon this car (minimum) the present rate from Cincinnati would be $38.40 and the new rate from Covington would be $24.90. The fair and reasonable charge for transporting this car from Cincinnati to Covington would not exceed (for example) $5.00. Under the new rates this carload could be shipped from Cincinnati to Bardstown for not to exceed $29.90. As a matter of fact, we infer it is meant to say, all through shipments of such cars from Cincinnati to Bardstown would cease unless complainant should, as it would for business reasons, reduce the through rates to (for example) $29.90. A substantially similar state of facts exists at the Louisville gateway, with reference to Louisville and Jeffersonville. (This state of facts is made to appear by tables set out in the brief.)"

"Assuming for present purposes, that such or a similar state of facts as those indicated were averred and could be proved, could it be rightly concluded that putting the new rates into effect would operate as a direct interference with and regulation of interstate commerce? If it would, it needs no argument to show that such enforcement would be violative of the federal commerce clause. *It is plain enough that reduction of receipts would be one of the results of enforcement of the new rates,* but it does not seem to us to follow that any of the figures adduced show direct interference with interstate rates, any more than they show unreasonable or confiscatory local rates. Such a depletion of revenue would ssem rather to be an indirect result of a proper exercise of purely state power. The alleged loss of $3,000.00, to be suffered it is said, on the through traffic, we cannot accept as a statement of necessary legal consequence, because

to do so would be to assume the direct effect which is in question. The loss alleged is apparently the same in principle as would be a loss or expense resulting from the due exercise of the universally recognized police power residing in the state. * * *

"Surely Congress did not intend, by the interstate commerce act, that interstate rates, made and filed as plaintiffs have been, should thereafter operate, not merely as interstate rates, but also as intrastate rates. *To say that Congress so meant is to ascribe to that body the purpose to take over to itself, the whole rate making power both federal and state.* The only theory upon which such a claim can be urged is that Congress has provided that interstate rates shall be filed with the Interstate Commerce Commission, and shall not thereafter be changed, except in the prescribed time and manner; and so the rates thus filed amount to an adoption by Congress or its Commission, in the sense that the rates exist and must be enforced as federal made rates. But it is provided in each of the interstate commerce acts, that the act *shall not apply to the transportation of passengers or property wholly within one state*, and not shipped to or from a foreign country from or to any state or territory." * * *

"Moreover, although the interstate rates of complainant from Jeffersonville, Ind., or from Cincinnati, Ohio, to Bardstown, Ky., are the same as the rates charged from Louisville, Covington and Newport, Ky., still complainant's adherence to its interstate rates, and its observance of the new local rate in dispute, would not, under the interstate commerce act, be regarded as an intent to discriminate against localities like Jeffersonville or Cincinnati. Saunders v. Southern Express Co., 18 Interst. Com. Com'n. Rep., 415, 421. Again, the state made rates are not regarded by the Interstate Commerce Commission as binding

as a necessary measure of the Interstate rates. Saunders v. Southern Ex. Co., supra, (421); Hope Cotton Oil Co. v. Texas & Pac. Ry. Co., 12 Interst Com. Comm'n. R. 265, 269

Conversely under these decisions it is difficult to see why a state should be found to adopt interstate rates, for although the federal power is supreme respecting interstate rates, *that would leave the state with no power at all in regard to rates*"

"What is claimed is that conditions existing in Kentucky do not warrant a greater charge for carriage of freight within Kentucky as interstate freight than for the carriage of purely local freight; and the averment that the Company will make a reduction of its interstate rates to correspond with the rates in dispute states nothing more than that it will do this for strictly business reasons. The question then at last comes to this: Whether a business or economic policy of a railroad company as distinguished from a legal duty, to change its interstate rates to correspond with just and reasonable local rates imposed by the state for the transportation of traffic originating and ending wholly within the state, can be said to be a direct, and not merely an indirect effect of the state's action."

* * * * * * *

"Must this long established power be now so construed as to eliminate the local rate making power? We have seen that Congress *has not so enacted.* It has expressly provided that it shall not be. True that body has not recognized any right in a state directly to hamper or burden interstate commerce; and all courts recognize the supremacy of the federal power to regulate commerce among the states. Whether congress has the power to forbid indirect interference with commerce among the states we need not consider, *for we do not discover any attempt on its part to exercise such power.*"

The examples of disparity between the interstate and intrastate rates in the Kentucky case, were identical in kind, with the examples given in the instant cases. They are examples that could be and have been practically duplicated in every state in cases of this kind. The similarity between the cases even extends to the claim in the pleadings that "conditions" in the state require identity of rates on the two classes of traffic.

In the case of Oregon R. & N. v. Campbell, 173 Fed. 957, this question was also recently before the Circuit Court of the District of Oregon in a case so similar to these cases that some of the vital allegations, as shown in the statement of facts made by the Court, are in the identical language of the bill of complaint in the instant Northern Pacific case. "Condemnatory facts" of the same general nature as those which the trial court claimed to be peculiar to these cases are set out and relied upon in the Oregon case. The making of intrastate rates such that the "sums of the locals" would be less than existing interstate rates between different points is claimed, and the alleged necessity for readjusting and reducing interstate rates is fully set forth. After very lucidly discussing all of these claims, the learned trial court said (page 985):

> "So if it be that the local state rates, as fixed and regulated by the state railroad commission on these commodities, unsettle in some way previously fixed transcontinental or interstate rates, that circumstance does not render the state rates invalid as an interference with

interstate commerce. Let it be supposed that the state was the precurser in making rates for the transportation of purely intrastate commerce, there could then, at that junction, be no conflict. Could it be contended that the state rate was invalid, because connecting railroads might desire to establish a transcontinental rate in combination with a local rate, also of their own making, which would conflict with the state rate? If so, the fixing of a state rate would be a precarious and evanescent thing to be dissipated at the caprice of the transportation companies, and the general government would usurp in practical effect the function of the state government in the regulation of intrastate commerce. Such was not the purpose of the framers of the federal constitution. Nor was it the purpose of Congress itself in the adoption of the interstate commerce act, wherein was recognized, as has been before noted, the right of the state to regulate commerce wholly within its borders. The bill therefore, in my opinion, states nothing that renders either the state railroad commission act, or the order of the commission, in conflict with the commerce clause of the federal constitution. This conclusion is borne out by the decisions of the Supreme Court."

Again at page 991, the Court says:

"But the order has or can have no effect beyond the limits of the state of Oregon. It was not so designed, nor is such its operative force except as it may affect interstate commerce incidentally merely. It is no purpose of the railroad commission act, nor of the order of the commission, that the rates fixed by the commission should be applied to interstate business, or any part or parcel thereof, nor to the business of complainant in Washington or Idaho, or elsewhere, than in Oregon That it may operate to affect incidentally interstate rates established, or the rates on complainants'

> lines in Washington and Idaho, is, as I have endeavored to show heretofore, not to the purpose. The question is: Are the rates established by the commission *in Oregon and for Oregon and not beyond its confines,* reasonable?"

No more concise statement than the foregoing could be made as to the status of rates made by a state for its intrastate business, nor could any amount of argument more strongly picture the absurdity of the claims, with which these cases are filled, as to the effect of the rates involved *if applied to business to which they do not and cannot apply.* As the court says, it was not the purpose of the state to make the rates apply to *interstate business or any part or parcel thereof, nor to the intrastate business of any other state.* That the rates do not and could not so apply, and that the question is: Are the rates established *by the state for the state,* reasonable as applied to the intrastate business of the state.

In the case of Southern Pacific Company, et al. v. Campbell, et al. 187 Fed.—in the Circuit Court for the District of Oregon, decided in July of the present year, Judge Bean refused to follow the doctrine enunciated in these cases, but adhered to the earlier decision of Judge Wolverton, saying:

> "The opinion of Judge Wolverton in that case" (referring to the O. R. N. case, supra), "contains such an exhaustive, satisfactory and full discussion of the subject as to leave nothing to be added. I fully concur in his views and am unable to distinguish this case in principle from the one decided by him. The averments of the bill that the order of the commis-

sion interferes with interstate commerce, is but the conclusion of the pleader, and is not in harmony with the facts alleged."

See, also,

Woodside v. Tonepah & G. R. Co., 184 Fed. 360, supra.

No decision can be found upholding the position of the trial court in these cases.

(e)

RELATIVE FAIRNESS AND EQUALITY OF RATES IN THIS AND OTHER STATES BEFORE THE RATES HERE INVOLVED WERE PRESCRIBED.

Although the courts have no rate making powers, yet we find the opinion in these cases devoting pages to the discussion of the manner in which rates should be made, laying down the "cardinal principles" and the "fundamental dogmas" of rate making (pages 396-7), leaving nothing to the policy or discretion of the rate making power. We have heretofore, referred to the proof of the constant changes that were being made by the companies in intrastate tariffs by what is known as "midnight rates," (Ex. 3-C, Staples, Vol. 9, No. 599).

Exhibit 3-D, Staples, in the same volume shows the inharmonious, unsystematic, unrelated jumble of arbitrary rates on grain and live stock,—the two principal agricultural products of the state—which were and are maintained by the several companies, and yet the trial court says that prior to the making of these schedules, all rates in the state were properly *related*.

The systematically related commodity rates in controversy would have superceded those arbitrary unrelated rates, were it not for the injunction herein.

The commodity rates prescribed by the state were prepared by the railway commission after thorough investigation on a uniform scientific plan, the same as the plan of the class rates on merchandise. This plan was afterwards *adopted by the Legislature unchanged*. The Master says on the subject, commencing at page 190 Record, Vol. 1, Case 599:

> "Thereupon the legislature of the state, which convened in January, 1907, enacted Chapter 232, General Laws of Minnesota, for the year 1907, approved April 18th, 1907, and effective by its terms June 1st, 1907, fixing a new schedule of commodity rates *in all respects like the schedule comprehended in the second order of the commission, excepting that the reduction in rates provided by it was* 10 *per cent less* than that provided by the order, a copy of which legislative enactment is annexed as an exhibit to the bills of complaint respectively."

The legislature by the acts aforesaid was not trying its hand at arbitrary rate making. It was simply trying by liberality to avoid this litigation. The only arbitrary act of the legislature was the two cent fare law, which, with an anti-pass law, was enacted to place the state on the same passenger rate basis *as adjacent states*. Every student of the subject knows that it was because of the universal practice of the railroad companies in granting rebates, monopolies in the transportation of certain articles to certain localities, and other in-

tolerable discriminations, that the granger movement first arose, which resulted in the upholding by this Court of the principal of equal rights in, and public control of, railroad rates.

Wherever discriminations have been suppressed and transportation favors done away with, it has been through the pressure of public compulsion, and not through the voluntary act of the carriers. In this state under the old rates, upon the ordinary passenger train it would be hard to find two passengers who were paying the same rate. Between summer tourists, clergymen, land seekers, excursionists, commercial travelers, and the ordinary man who paid the full price, there was and is a variety which is sadly at variance with the condition pictured by the trial court. The same was and is true as to freight.

To demonstrate how the "fundamental dogmas of rate making" were violated by these schedules, the court gives an illustration (page 397, Vol. 1, No. 599) of the projection of the rates on first class merchandise here involved from St. Paul to Spokane, a distance of 1510 miles, as to which some explanation is necessary.

The court refused throughout to see that these rates stopped at the state line, because the governmental powers of the state stopped there, and that everything transported by either of the companies across the line of the state was carried on the "distance" or "terminal" or commodity rates prescribed by the carriers themselves *and not on these tariffs*. The Court failed to recognize that the

boundaries of the states are boundaries of distinct governments, and that rates do not rise or fall at the state line because of differences between rates within the states and rates between them. The rates *within*, apply to one class of commerce and the rates *between*, to another. The commerce to which the rates within the state apply *does not* cross the line, and therefore has nothing to do with rates beyond the line. The commerce to which the rates between the states apply, *necessarily* crosses the state line, and has no connection or concern with rates which cannot cross the line.

But as the Court has seen fit to go into a discussion of the plan of the schedule, we will be pardoned for digressing from the real issue sufficiently to point out that the plan of the schedule is exactly the same as that of the distance and terminal tariffs established by the companies themselves, and in use by them for many years. The ordinary class tariffs of railroad companies are either "distance" or "terminal" tariffs." "Terminal" rates are the rates charged between large distributing centers and the various stations on the line, and "distance" rates are those charged between all stations, *neither of which is a terminal.* Usually but one tariff is prepared to serve for both *distance* and *terminal* hauls, the "terminal" tariff always being a fixed per cent less than the distance tariff. Exhibit 46, Maguire, gives an example of this kind of a tariff on first class merchandise on the Great Northern road (Vol. 10, Case No. 600). *The distance tariff is 105% of the terminal tariff for same*

distances. On this tariff sheet the progressions are 3 cents for each five miles, up to 35 miles; 2 cents for each five miles thereafter up to 60 miles, and 1 cent for every five miles thereafter. In his report at page 190 (Case 599, Vol. 1) the Master speaking of the rates here involved, says:

> "The rates prescribed are *maximum terminal rates,* and may be increased by five per centum for shipments between stations neither of which is a terminal or distributing station."

In this respect, therefore, the tariffs are identical with those of the companies.

General Characteristics.

Every tariff starts with an arbitrary allowance for the first distance named, which includes the terminal charges to cover all services rendered by the company in receiving and delivering the shipment, as well as hauling it for the given distance. There is no amount specified in the state or any other tariff as a *terminal charge.* The whole charge for any distance is the *rate* for that distance. The shortest distance named in the company's tariff is 10 miles, for which distance the first class rates, including terminal charges, is 10 cents. The state schedule designates five miles as the minimum distance, upon which the arbitrary charge, including terminal services, is 12 cents, the ten-mile charge being 12.98 cents. Rates in both schedules are then specifically prescribed for all additional distances of five miles, with the proviso in the state schedule that where stations are not at these exact

distances, the rate for the next higher distance may be charged.

Mr. A. G. Maguire, the Assistant General Freight Agent of the Great Northern, at page 932 of Vol. 3, Case No. 600, testified concerning the nature and amount of terminal charges as follows:

* * * * *

"Q. Do you know what the terminal charges are either in Minnesota or in North Dakota?

A. I can figure out the terminal charges on any distance tariff that you ask. *What the actual cost is I don't know.*"

* * * * *

"Q. How do you know that?

A. When this tariff was made there was no specific rate mentioned for five miles, as previously explained; in fact all our tariffs started at ten miles. We have a set rate of 10 cents for a ten mile haul, which includes the terminal allowance. The next rate we have * * * is 20 miles, 16 cents. The difference between 10 and 16 is 6, which represents the ten-mile haul, leaving four cents for what might be termed a terminal allowance."

* * * * *

"Q. We have all agreed, I believe, that the terminal charge allowed by the Commission is 11 cents.

A. 11.02 cents.

Q. The result is that the terminal charges allowed under the order of the Commission are greatly in excess of the terminal charges made by your road under any of these conditions?

A. Well, the Commission have allowed a larger terminal allowance in their tariff. Yes, sir.

Q. Therefore, by taking advantage of that fact, and deducting the terminal charge from what you describe as the hauling charge in the Commission's order or in Chapter 232, you

obtain a disproportionately small hauling charge.

A. You obtain a very much smaller progression than you obtain in our tariff."

The "rate of progression" for additional distance in the state schedule is .98 cents for every five miles up to a total haul of 200 miles (Exhibit "A" attached to complaint); from 200 to 400 miles the rate of progression is but half of that for the first 200 miles. Four hundred miles is *a longer haul than any railroad involved has in the state,* so that rates for greater distances than that are immaterial, as all the rates are limited to a continuous haul on the same line of road. The rates on all classes below the first in the state schedule, are, as is usual, a fixed per centum of the first class rate. The purpose of the classification of merchandise, is to make such a system of rates possible; there is no other way in which a symmetrical "relation" could be maintained. The exact difference between the class percentages in the state merchandise schedule, and the old rate on the Northern Pacific, is shown in Exhibit 3-F, Staples (Vol. 9, Case No. 599). The only difference in the plan of the tariffs, either as to the rate of "progression," or as to the percentage relation of the rates on the lower classes to the first class rate, is not a difference in kind, but only in slight degree, the state schedule giving somewhat lower rates after a distance of about twenty-five miles is reached, and a higher rate for shorter distances.

THE PROJECTION TO SPOKANE.

We now return to the "projection" of the first class merchandise rate of the state schedule made by the Court (page 397, Vol. 1, Case No. 599) from Moorhead to Spokane. The Court calls attention to the fact that Moorhead on the state line is 248 miles westerly of Saint Paul and therefore takes the state rate for 250 *miles,* being 55.12 cents per cwt. This rate is 2.22 cents per cwt. for each ten miles, when the whole distance is considered, but the rate of progression under the tariff is only .98 cents for each ten miles *for the last* 48 *miles,* being the distance involved in the haul *beyond* 200 *miles.* The Court, instead of extending the rate to Spokane on the basis of the *whole rate from Saint Paul to Moorhead,* projects the rate for the 1262 miles beyond Moorhead, at the *rate of progression* allowed by the schedule for the last 48 miles of the 248 mile haul, and in that way gets a rate to Spokane of $1.79, while the existing interstate rate is $2.50.

If the Court had made the projection to Spokane at the *average* rate of progression *in the state,* it would have given a rate to Spokane of $3.35.

The Master, at page 206 of his report, in using the same example, copied as above by the court, excuses the use of the "progression" for the last 48 miles of the haul, by saying that in making the extension in that way he was proceeding in accordance with the "principle" on which the state tariff was constructed. But both the Master and the

Court entirely overlooked the fact that the fundamental and inviolable "principle" of the state tariff was that it should stop at the state line and not be projected at all. In attempting to project the rates beyond the boundaries and jurisdiction of the state, and applying them to a class of commerce over which the state neither has nor claims jurisdiction, it was not only violating the plan and principle of the schedule, but also disregarding our constitutional plan of government.

As a matter of curiosity, let us now extend in the same manner, the company's first class merchandise rate on the N. P. from St. Paul to Moorhead—to Spokane, and see what the result would be under a tariff presumably constructed according to the "fundamental dogmas" of rate-making.

Exhibit 3-E, Staples (Vol. 9, No. 599) gives the rates actually maintained on the Northern Pacific, as well as other roads in this state before the state rates were established and also the state rates from which we take the following excerpts for the four principal roads for distances up to 300 miles showing the Northern Pacific and Great Northern rate to Moorhead being the rate for the distance of 250 miles.

Miles.	G. N. Ry.	N. P. Ry.	Soo Line.	C. M. & St. P.	Minn. State rates.
10	12	..	12	12	12.98
50	30	30	30	30	20.82
100	41	41	41	36	30.62
150	50	46	52	44	42
200	60	58	57	44	50.22
220	64	66	60	44	52.18
230	67	67	67	44	53.16
240	67	67	67	50	54.14
250	67	67	67	52	55.12
260	67	67	67	53	56.10
270	67	67	67	54	57.08
280	67	67	67	57	58.06
290	67	67	67	60	59.04
300	67	67	67	..	60.02

It will be seen by this schedule that there is no "progression" or increased charge allowed by the Northern Pacific company for the last 18 miles of the haul,—the rate for 250 miles (the nearest specific distance) is the same as the rate for 230 miles. The last distance for which there was an extra charge in this haul on that road was from 220 miles (to which the rate was 66 cents) to destination at Moorhead (250 miles) to which the rate was 67 cents, or an increase of one cent for 30 miles. If we compute the rate to Spokane (1262 miles additional) at the rate of progression of one cent for every thirty miles, it will give us a Spokane rate of 98 cents, as against the "legal" interstate rate of $2.50. To illustrate further the folly of this kind of

a comparison by the "extension" of a schedule, we call attention to Exhibit 36-Baird (Supplementary), Vol. 10, record, Case No. 599, which gives the Northern Pacific terminal rates up to a distance of 400 miles from Minneapolis, which is beyond the state line, (the longest mileage of the Northern Pacific in the state being from Twin City to East Grand Forks, 310 miles). It appears from this exhibit that the increase or "progression" between 200 and 300 miles is, as above shown, seven cents, while between 300 and 400 miles the increase or progression is 22 cents.

Now, if we compute the rate to Spokane, by applying to the additional distance above 300 miles, the "progression" in the company's rate for the distance between 200 and 300 miles, it will give this result:

First class merchandise rate for 300 miles,	$0.67
1210 miles additional at 7c per 100 miles,	.84
	$1.51

If we compute the rate from St. Paul to Spokane by applying to the additional distance above 400 miles the company's rate of "progression" between 300 and 400 miles, it will give this result:

First class merchandise rate 400 miles (36-Baird),	$0.89
1110 miles additional at 22 cents per hundred miles,	2.44
	$3.38

Examples could be multiplied on such a plan *ad infinitum*, and would give as many different rates to Spokane as there were colors in Joseph's coat without throwing the slightest light on any of the issues in this case.

The uncontradicted testimony of Mr. Flinn, the Chief Rate Clerk of the State Railway Commission, conclusively shows the folly of all these extra territorial comparisons. He said on the subject, at page 2393, Vol. 6, record, No. 599:

> "I do not think there is any good reason for instituting comparisons as to the effect that the extension of the rates in the Minnesota schedules would have on the revenues of the lines running into Dakota and Montana, because of the fact that the schedule of rates was made by the Minnesota Commission *for use in the State of Minnesota*, in exactly the same way that the Iowa distance tariff was made for use in Iowa. To illustrate that, I might say that the rates from Des Moines to St. Paul, first class, is 63 cents, while if you take the Iowa distance tariff for that haul, which on the short line basis is 312 miles, you would get a rate of 45.6 cents per 100 lbs. I think that example is a fair illustration of any condition that would obtain just through those particular rates."

Mr. A. G. Maguire of the General Freight Department of the Great Northern, was asked at page 935, Vol. 3, Case No. 600, of the extra territorial effect of the intrastate rates in other states, as follows:

> "Q. Now if we should endeavor to extend the rates maintained in Iowa, on the Iowa distance tariff, or the rates maintained in Illinois for many years, we should find just as

many inconsistencies and just as many differences as you have shown would exist if you extended the Minnesota rates on any of the five theories, wouldn't you?

A. Well, I don't know as I am competent to say, but I doubt very much if you would.

Q. You do know that the Iowa rates are very much lower, as a whole, than the rates prescribed in the Minnesota schedule?

A. They are for some distances. I am not sure about the progression.

Q. And you do know that the Illinois rates are altogether different from the rates in Minnesota?

A. Yes, sir.

Q. And the South Dakota rates, and the North Dakota rates?

A. The South Dakota rates are higher."

* * * * *

Continuing, at page 936, he testified:

"Q. And the local rates in all the states which I have mentioned have been different as long as you have known anything about railroading?

A. Not altogether; no, sir.

Q. Can you name any two states in the Union where rates have been established for traffic exclusively within those states in which the rates are identical?

A. I don't know; I don't believe they are the same. I know the Minnesota and the South Dakota and the Iowa rates are not the same, and I don't recall enough about the others to remember. They probably are all different."

Speaking about disparities between rates from the East and the West he said, at same page:

"There are a good many million rates, and very few of them agree; there are a great many commodities, and all sorts of conditions."

At page 937 he said:

"Q. You know if you extended these rates into Iowa, you would get a higher rate than is allowed by the law of Iowa?

A. I don't think there is any similarity in the extension of a rate—

Q. Do you know whether if you extended them from here to Chicago you would get higher rates than are maintained between here and Chicago?

A. I never have figured it out.

Q. Or if you extended them from here to New York, you would get higher rates than are maintained betwen here and New York?

A. I don't know.

Q. You know that the rates allowed for the haul from here to Duluth are higher than the rates maintained by your road from here to Duluth?

A. They are a trifle higher I think.

Q. And you know of course that the condition of the haul upon the western line of your road—over mountains, where the country is much more sparsely settled than it is in Minnesota—are such as to make the carriage of freight relatively much more expensive?

A. Yes, sir; I think it would be.

Q. Well, now, if you were going to extend these Minnesota rates upon *any theory*, why didn't you extend them both east and west, and let us see how they compare with rates generally?

A. I extended over our own lines, under our own conditions. I know very little about the conditions in other localities, and on other lines. There is no end to that sort of thing."

At page 938, same volume, Mr. Maguire testified:

"Q. Now, Mr. Maguire, I show you the Iowa distance tariff, and hand you the publication marked "State of Iowa schedule of reasonable maximum rates of charges for the transportation of freight and cars, taking effect March 1st, 1905." Will you please look

at that and see how much is allowed for each five miles of the haul.

A. Eight tenths of a cent up to twenty miles, and six tenths of a cent from 25 to 50 miles.

* * * * *

Q. Well, go on, it goes further than that.

A. 210 miles up to 300 miles it is six tenths cents for each ten miles, that is the same progression as the other. * * * Then from 300 miles up to 500 miles it is five tenths of a cent for each ten miles.

Q. Now, assuming that that is a correct tariff * * * you know, do you not, that it has been maintained in the State of Iowa for several years?

A. Yes, sir.

Q. And utterly disregarded outside of Iowa?

A. Well, *we have disregarded it.*

Q. And so far as you know, every road has disregarded it. I think it already appears in evidence in this case, for instance, that the rates from Des Moines to Saint Paul are not established with regard to that tariff?

A. *Yes, I think as a general rule it is disregarded.* I want to correct that and state that the lines use the Iowa distance tariff as proportional interstate tariffs west of the river.

* * * * *

Q. You don't mean that they use the Iowa distance tariff as a basis for extending the rates outside of the State of Iowa?

A. *I don't think they use the Iowa distance tariff as a basis for extending the rates outside of Iowa; no sir."*

The Great Northern and the Northern Pacific Companies have lines crossing the state boundary at different distances from the Twin City and complaint is also made that when those points of exit are reached the "rate of progression" under

the state tariffs is not the same,—in the one case being .98 cents for each five miles, and in the other .98 cents for each ten miles and that this also produces discrimination. We can only add that not a pound of freight ever did or ever can cross the line of Minnesota on these tariffs. Not a dollar in money was ever collected, or can ever be collected under these tariffs between any point in Minnesota and any other point near or remote in any other state. Every pound of freight that crosses the boundary of Minnesota goes out on the interstate tariffs of the companies, all of which have been made by the companies themselves, the way-bill upon each shipment being made according to the tariff that applies to the shipment, and not upon a tariff which does not apply to it. If the companies were not compelled by the laws of trade to change their interstate tariffs into or out of Iowa, where the intrastate rates are much lower than ours, it is absurd to say that they were obliged to change them here.

There is no question but that, either to lay a foundation for this litigation, or to please the Twin City jobbers, the Great Northern and Northern Pacific Companies changed and slightly reduced their rates into North Dakota at the time these rates went into effect.

But those changes were made before these suits were brought, After the new interstate rates had been voluntarily filed they became the *legal* interstate rates. The Court could not restore the old rates, and as the new ones harmonized with the

rates here involved, there was no existing discrimination, upon which the Court could pass.

If the injunctions had been sought before the reductions were made there would at least have been some reason even if there was no legal foundation, for the claim of discrimination.

After the alleged discriminations had been voluntarily removed, there was nothing for the Court to act upon.

But the testimony of Mr. Flinn showed that there had been no reductions into or out of Iowa, Wisconsin or other southern or eastern states, where population and traffic are of similar density, *and the companies made no such claim.* On the Minneapolis and Saint Louis road, Mr. Tittemore, the Traffic Manager, admitted that the merchandise rates which were the only freight rates adopted, did not affect its interstate business. His testimony as at page 140, Vol. 2, Case No. 601, is as follows:

"Q. Then the merchandise rates may be applied to the traffic within the State of Minnesota without any extra-territorial effect?

A. It can be applied to the business on our road in the State of Minnesota without having the same effect that the commodity rate would have.

Q. Would it have any effect?

A. Oh, yes, it would have some effect, but no serious effect.

Q. It would have some effect?

A. *The effect of the reduction in itself.*

Q. I am not speaking about the reduction in itself, but would it have any effect upon interstate tariffs. I am not talking about interstate revenues.

A. So far as our road is concerned, the effect would not be serious in the merchandise.

Q. Would it have any effect?

Mr. Durment: That is on interstate traffic?

A. It would not have much effect on it. We could ward against it.

Q. *Would it have any effect, or compel a change in any interstate rate?*

A. I am not prepared to say that it would not."

The Court nevertheless finds that the same differences in rates on the different classes, were created on the Minneapolis & Saint Louis, producing the same "discriminations in fact," and that consequently as to that road, as well as to the others, the "necessary effect," which Mr. Tittemore, the Traffic Manager, says was nothing, made the rates unconstitutional as to that road. The Court finds as to the two Northern roads that one of the purposes of the companies in changing some of their interstate rates into North Dakota was to favor the Twin City jobbers and another was to *meet competition*. But whatever the reason was, these railroad companies cannot cripple the government of the state of Minnesota by charging it with responsibility for their voluntary acts, and thus make it vicariously guilty of violating the constitution of the United States. Instead of any "cardinal principle of rate-making" being violated by the tariffs in controversy, under them, for the first time in our history, intrastate rates were made absolutely uniform and were automatically related between the classes. The legislation of the state

was mainly directed toward securing the equal rights for all which this court has held that all are entitled to. The railroads never followed any "cardinal principle" in their rate making. All railroad-made tariffs, not only in this state, but elsewhere, are a mass of inequalities and discriminations. At page 1492 of Vol. 4, N. P. Record (No. 599) Mr. Baird of the Northern Pacific, after declaring that the rates of the company were *properly related* was asked whether the rates then in force on that road were the same in any two states through which the road passed. The question had to be repeated several times in order to get a categorical answer. He finally said:

> "A. They are not the same, as to all of the details; they manifestly cannot be. It would be impossible to make them the same, because they represented different movements of traffic, different kinds of traffic, and traffic moved under different circumstances."

The Interstate Commerce Commission in the opinion rendered February 22nd, 1911, entitled: *"In re investigation of advances in rates by carrier in western trunk line, Trans-Missouri and Illinois freight committee, territory,"* 20 I. C. C. 347, refers extensively to the genesis of railroad rates. The commission quotes the testimony of Mr. Ripley as one having had experience as a traffic manager, over several great systems of railroad, from the Atlantic to the Pacific, as follows:

> " 'I think,' said Mr. Ripley, 'that the cost of service is only one of the items to be considered in the making of a reasonable rate, and not a

very important item at that—either the cost of service or the returns made on capital. I think that while they may be considered under certain conditions they are remote.' "

And again: "I think that the cost of the service has very little consideration in the making of rates. Rates are made without a consciousness on the part of the carriers' agent of the return that these rates will bring. * * * The maker of the rate," he says, "in the first instance must make the rate such as to permit of the freest intercourse and the freest interchange of commodities in the country regardless of capital, regardless of cost—almost regardless of cost, but entirely regardless of capital. Then, being asked as to whether the Commission should make rates after this railroad fashion, he said, 'I think they' (the Commission) 'should consider the *value of the service* first and foremost and leave the *cost* and *value of the properties* to altogether secondary consideration.' He was asked if he had said that the making of freight rates has not, never did have, never will have, never ought to have, any relation to the capitalization of the railroads, to which he replied that this was a correct expression of his views.

Discarding the elements of cost and capitalization, he was asked to define a reasonable rate, and replied that it was one that the traffic would bear, 'and the amount the traffic would bear,' he said, 'is that amount of charge at which it will most freely move over the lines of transportation.' This definition he again repeated when he was asked if the phrase 'what the traffic will bear' meant the rate at which the commodities would "most freely move over the lines of the carriers,' to which he replied, 'I will qualify that by saying, what the traffic will bear and still move most freely and enable the products and the manufacture of one part of the country to be used to the utmost possible extent in the other."

The foregoing is an expression of the policy of railroad traffic managers in general as gathered from the testimony of railroad officials in these cases, and the interference of the government with the exercise of this arbitrary power to make indiscriminate unrelated rates is bitterly resented, in these and other cases. The Interstate Commerce Commission says as to Mr. Ripley's theory (page 43):

> "This theory entitled the railroad to enter the books of every enterprise which it serves and raise or lower rates without respect to its own earnings, but solely with respect to the earnings of those whose traffic it carries. *This is not regulation of railroads by the nation, but regulation of the industries and commerce of the country by its railroads.*"

Speaking of another traffic manager, who contended for the same plan of rate making in the same case, the Commission said:

> "And this same witness was unwilling to acknowledge that his judgment of what was proper, reasonable or just, should be subject to review by this commission *or any other tribunal*—a position which may fairly be characterized *as a modern extension of the ancient principle of Divine right.*"

It was the rate schedules so made by the railroad companies, that they claimed and the learned trial court declared in these cases were so intimately associated and related that a change in one rate or class of rates would throw the whole delicately adjusted system out of balance. Such a system of rates never did and never will exist, except in the allegations of complaints. It is a disingenu-

ous argument against the exercise of the power of control by the government. If rates are excessive or unreasonable per se, they must regardless of their "relations" to other rates, give way to rates that are reasonable in and of themselves, as to the class of business to which they apply. It is against the exercise of the power of governmental control over rates that these suits are directed, and not against the rates involved. Every point urged against the rates would apply as well to any other rates made by the statute as to these, so that the purpose to destroy the state's power stands plainly revealed. At page 3190 (part 1, Vol. 7, Case No. 599), the Northern Pacific Record, Mr. Elliott, the President of that company, after having testified that no one was capable of passing upon the question of the reasonableness of rates but railroad men, was asked:

> "Is it not true that your position results in the conclusion that proper supervision by public officers is of necessity impossible?"

To which he frankly answered:

> "A. Well, I am inclined to think that is true. I have been of that conclusion for quite a number of years."

CONFISCATION.

There cannot be two standards of reasonableness, with reference to transprotation rates, one a *legislative* standard, the other a *judicial* one.

The absolute power to say what is reasonable must belong to one branch of the government or the other. It is an indispensible attribute of the rate making power. The making of a rate is the prescribing of a rule for the future and is therefore, as this Court has said, a matter distinctly legislative in its nature. When the judgment of the legislative branch of the government has been exercised, and rates have been prescribed which afford a return upon the property over and above the cost of operation the payment of fixed charges and taxes, it is to be presumed that such is the return the law making power intended. May the courts, under the *due process* and *equal protection of the law* provisions of the fourteenth amendment, substitute their judgment for that of the law making power, as to whether the return so fixed is *reasonable* or not? If they may why continue to call the rate making power a legislative one?

The *taking* of property *for* public use, and *limiting the income* of property *devoted* to the public use, are plainly different functions. In limiting the return on money the legislature is presumably expressing the will of the people. The courts have no power to change the rate of interest on money, no matter what rate may be fixed by law. The

banker and money lender engaged in private business have more right to claim immunity from legislative interference than the investor who has voluntarily undertaken the performance of a function of the state. If their investments, so far as a return is concerned, are at the "mercy" of the legislature, why should not the judgment of the legislature as to rates for a public service, so long as a profit is allowed and the property is not "taken," be conclusive? The legislature of Minnesota has fixed six per cent as the legal rate of interest on the actual investment with the right to make a special contract for a rate not higher than ten per cent, *subject to taxes*, with a usury law prohibiting all *bonuses or fictitious enlargements of the debt.* The legislature also, either directly or through its commission, fixed the rates involved here, and, somewhat analagous to the usury law, they forbade the issuance of fictitious securities upon which a return could be claimed.

The Master however abolished this limitation upon the carrier by holding, for the first time in the judicial history of the country, that the maximum basis for railroad income, when rates are challenged as confiscatory, is not the capitalization—though such capitalization is largely in excess of the cost of the road,—but a sum, based upon hypothetical conjecture, called the "cost of reproduction."

This Court held in the case of Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, that rates which would not pay one-half the interest on legitimate bonds in a case where the stock had

never received a dividend, were confiscatory. In these cases no complaint is made as to the interest on the bonds or dividends upon the stocks. Both it is admitted were amply taken care of. The complaint is on account of an alleged inadequate dividend on the "value" in excess of *all capitalization.*

The Circuit Court of the Eastern District of Kentucky, said in the recent case of L. & N. Ry. Co. v. Siler, 186 Fed. 189:

> "What may be a reasonable rate or return as a matter of legal policy having due regard to encouraging the investment of a capital in railroad enterprises is one question; but when the inquiry becomes a judicial problem, to be considered as involving the taking or not taking of the railroads property, it is essentially a different question."

In Chicago, Burlington & Quincy R. R. Co. v. Iowa, 94 U. S. 155, 161, 162, this Court said:

> "In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons when controversies arise, *what is reasonable.* But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in similar business."

The above language is quoted with approval in the case of Dow. V. Beidelman, 125 U. S. 680, 687, and overthrowing the claim that the question of reasonableness is always a judicial instead of a legislative one, Mr. Justice Gray, said:

> "Where property has been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable for its use. This limits the Courts as well as the

people. If it has been improperly fixed, the legislature not the Courts must be applied to for the change."

Discussing the rates called in question in that case the Court further said, (p. 690):

"The plaintiffs in error do not contend that it is always or generally unreasonable to restrict the rate for carrying each passenger to three cents a mile. They argue that it is so in this case by reason of the admitted fact that with the same traffic that their road has now, and charging for transportation at the rate of three cents per mile, the net yearly income will pay less than 1½ per cent on the original cost of the road, and only a little more than 2 per cent on the amount of its bonded debt. But there is no evidence whatever as to *how much money the bonds cost*, or as to the amount of the capital stock of the corporation as reorganized, or as to *the sum paid for the road by that corporation or its trustees*. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equalled the original cost of the road or the amount of outstanding bonded debt. *Without any proof of the sum invested* by the reorganized corporation or its trustees, the Court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature is unreasonable. *Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law.*"

The Court more recently said in San Diego Land & Town Co. v. National City, 174 U. S. 739:

"Judicial intereference should never occur unless the case presents *clearly and beyond all doubt*, such a flagrant attack upon the rights of property under the guise of regulation as to compel the Court to say that the rates pre-

> scribed will necessarily have the effect to deny just compensation for private property taken for public use."

DIFFERENCE BETWEEN TAKING AND REGULATING THE INCOME OF PROPERTY.

Property may be literally *taken*, in order to employ it in the public service, only by the exercise of the power of eminent domain. It may also be *taken* in order to facilitate the exercise of the police power over it, so as to drain and grade it in removing a menace to the public health. Sweet v. Rechel, 159 U. S. 380. In the latter case, in order to promote a police purpose, the fee of the land was taken by the City of Boston and compensation duly provided for, the Court holding that the taking was by the exercise of the power of eminent domain, in aid of the police power.

In Chicago B. & Q. R. Co. v. Grimwood, 200 U. S. 561, 593, this Court said:

> "If in the exeution of *any* power, no matter what it is, the government, federal or state, finds it necessary to *take* private property for public use, it must obey the constitutional injunction to make or secure such compensation to the owner."

But in that case the Court clearly pointed out the difference between the incidental interference with the rights of property resulting from the exercise of the police power of a state out of which the owner's right to compensation does not arise, and the *taking* of the property itself out of which the

right to compensation does arise. The Court held that a police regulation, requiring a railroad company to remove a bridge that had been lawfully constructed by the company over a stream, in order to permit the widening and deepening of the stream in aid of a proposed scheme of drainage,—the company to rebuild the bridge at its own expense,—was not a "taking" of the property of the company for public use so as to entitle it to compensation. This Court said, as to the difference between "taking" and *affecting* property (p. 594):

> "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no *taking* of property for the public use, and a right of compensation on account of the injury does not attach under the constitution. * * * It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given. Sedw. Stat. & Const. Law, 434."

See Mugler v. Kansas, 123 U. S. 523, 669.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 557, 571.

Gibson v. U. S., 166 U. S. 269, 271, 276.

New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453.

Union Bridge Co. v. U. S., 204 U. S. 364, 385, 387, 400.

In the regulation of railroad rates under the police power of a state, no "taking" of the property, in the constitutional sense, is contemplated. The purpose of the power of regulation where legiti-

mately exercised is to directly affect the income so as to make it reasonable, and inasmuch as the legislature has undoubted power to determine the reasonableness, there is necessarily a conclusive presumption that *any net income* allowed is legislatively reasonable. If the Court in a case of this kind can fix the income of a railroad at a different figure than that fixed by the legislature, the Court is thereby necessarily fixing the rates.

The Master in this case, after finding what he was pleased to call "value" at more than 150 per cent of all outstanding securities of the railroad companies, (which securities also represented other property, and included large amounts of water), held that the return necessary to protect the rates against the charge of confiscation under the fourteenth amendment, must be at least *seven per cent*, "upon the value of their property as herein found." (Page 251, Vol. 1, Record Case No. 599.)

He said on the subject:

> "Any rate which will not produce a full and fair return is unreasonable, and is confiscatory to the extent that it comes short of producing such return, and is taking property from the carrier class and giving it to the persons served, without compensation. * * * It must be remembered also that the public demands and is able and willing to pay for service of the highest efficiency, requiring able and skillful management. The continued prosperity of the country depends upon it, and the return from such undertakings should be sufficiently adequate to *encourage the investment of ample capital for their successful prosecution.*"

This finding was in all respects approved by the Court. In that, as in many of his other findings and observations, the Master was not embarrassed by the fear that he was usurping legislative functions. He even felt the need of prescribing the states public policy by providing for the future investment of "ample capital" in railroading. He evidently overlooked the fact that the government may at any time construct railroads itself, and is not so situated that it needs to "encourage" any one else to perform its functions. His "return" of seven per cent on the entire "value," as found by him, regardless of capitalization, would permit the companies to enjoy that return on the part of their capitalization represented by *bonds*, as well as on the part represented by *stocks*,—and as he afterwards applied it, the "return" was to be in excess of operating expenses, *extensive improvements made from earnings* and deducted from the earnings of *the year in which they were made*, and taxes.

The "return" of *seven per cent* thus allowed by the Master *on fictitious value*, and the excess allowed on the part of the value represented by bonds above the actual interest thereon, would as we have hereinbefore shown amount to more than sixteen per cent on the outstanding *stock* of the companies.

If the government had performed its functions by constructing these highways itself, the "value" could never exceed the original investment, and the return would be simply the interest on the bonds issued for the necessary money, and a proper fund to cover depreciation.

In the Cotting case, 183 U. S. 79, the late Mr. Justice Brewer said that inasmuch as railroads are performing a function of the state, the rights of a railroad are to be determined by the same rules which would apply to the state, had it performed its functions itself.

The discussion of the question here however is somewhat academic because this Court has never held, that rates must afford an income on "value" in excess of capitalization, and these rates on any theory as to "reasonableness," afford more than adequate income on the capitalization.

Outside Properties Covered by Capitalization.

As heretofore pointed out the Master found that the outstanding capitalization could not be taken as a measure of value, because it represented much other property than the railroads, the values of which outside properties the companies refused to disclose. There were the Northwestern Improvement Company of the Northern Pacific, and the Superior Company Limited of the Great Northern, representing fabulous wealth. The rates involved

were paying out of transportation, a "return" upon the entire capitalization with which these properties were acquired, in addition to the return paid by the properties referred to, but the Master committed a still more glaring error in favor of the companies.

The Express Companies.

It was made to appear in both the Great Northern and Northern Pacific cases that each of the railroad companies owned all of the stock of the Express Company operating over its line.

There is no legal dividing line between what is known as *express*, and *freight*. Anything that is the subject of shipment could be forwarded by express. The arrangement between the express company and the railroad company in each case was that a proportion of its gross earnings—in the neighborhood of 50 per cent—was paid by the express company to the railroad company for the transportation. But after paying the other operating expenses of the express company, a very large sum remained which belonged in each instance to the railroad company—derived from the actual transportation of property over its line. This sum was paid to the railroad stockholders in addition to the sum paid as dividends out of its other transportation earnings. The Master, (p. 280, Vol. 1, Record No. 599), refused to consider the money so received by the railroad company as income from transportation.

It can be seen that there is nothing whatever in the way of the railroad company, under this rule,

putting all of its most profitable small freight into the express category, and thus securing a double "reasonable return" by means of this palpable wheel within a wheel.

As to the Northern Pacific Company, it appeared that while its case was being tried, the earnings of the Northwestern Improvement Company, (all of its properties having thus been acquired by the railroad capitalization,) paid a dividend of over 11 per cent on the entire capital stock of the railroad company. (Vol. 8, p. 564, Record No. 599.)

STATISTICS SHOWING INCREASE IN BUSINESS IN STATE.

It appears under the head of "Conclusion" in the Master's report (p. 281, same volume) that the right was reserved to either party to refer to the public reports filed by the railroads annually with the state. We desire to invite the Court's attention to a few statistics taken from said reports showing the growth in the lines and business of the railroads in the state from 1900 to 1910, the rate and fare adjustments here involved having been made in 1906-7.

Railroad mileage in the state, all roads:

1900, ... 6996.89

1910, ... 8764.10

Railroad gross earnings in state, all roads:

1900, ... $44,923,984.76

1910, ... 99,471,992.22

Increase in mileage decennial period 25 per cent.

Increase in gross earnings same period, 121 per cent.

To show that this increase was not sporadic or accidental, but resulted from a general and well balanced development of all lines of the business, we quote from the same records the statistics of the business for the two years above mentioned.

1900—No. of passengers carried, 5,157,878; No. of passengers one mile, 232,915,891; No. of tons carried, 26,322,192; tons 1 mile 2,644,634,471.

1910—No. of passengers carried, 14,266,516; No. of passengers one mile 748,723,995; No. of tons carried 83,094,811; tons 1 mile, 7,967,824,525.

EARNINGS UPON ALL BUSINESS DONE IN THE STATE AS SHOWN BY THE MASTER'S REPORT.

The findings of the Master show that on the excessive valuation of the property of the companies found by him, and after adding all taxes paid by each to operating expenses, and thus placing the burden of railroad taxes on the public, the net income of the Northern Pacific in the state was 6.021%, (page 269, Vol. 1, Record, Case No. 599); of the Great Northern 5.909%, (page 267, same volume of record); and of the Minneapolis & St. Louis Company 4.14%.

The excessive *valuation* of the company's property in the state was therefore not in itself sufficient to impeach the rates, even on the theory of the Circuit Court as to the necessary return. It required the Master's apportionment of value so found, to the intrastate business, and his apportionment of the operating expenses to the intrastate business to accomplish that purpose.

We will now respectfully invite attention to what we claim to be the errors in each of these processes as followed by the Master.

V.

THE COURT IMPROPERLY APPORTIONED BETWEEN PASSENGER AND FREIGHT AND BETWEEN INTERSTATE AND INTRASTATE BUSINESS IN EACH, THE "REPRODUCTION COST" TAKEN, THOUGH IMPROPERLY, AS THE BASIS UPON WHICH TO PREDICATE RATES.

(A) Apportionment between passenger and freight.

There are two primary branches of the transportation business, *passenger* and *freight*, and in each branch there are two fundamental classes, interestate and intrastate. It is disclosed by the record and is also a matter of common knowledge that much, but not all, of the way and structures are used in common in both the branches of the business, and the same is true to some extent of locomotives, *but not as to other equipment.* It is apparent therefore that in ascertaining the value of the property employed in either branch, it is necessary to segregate and charge to that branch whatever part of the property is used exclusively therein, and to apportion between them on some fair basis the value of the part of the property that is used in common in both. In making this apportionment between the freight and passenger branches of the business, all the property used in the state must be treated as a unit, and the values thus assigned to each branch must be then reapportioned between the interstate and intrastate classes

in each branch. The sum of the value of the parts thus ascertained for *intrastate* freight and *intrastate* passenger business respectively will be the basis for our further computations.

Lack of Mathematical Certainty.

These apportionments of the value of the property used in common, cannot be made with mathematical exactness. But they can be made on the basis of common units of use that will give approximately correct results. The absence of mathematical certainty in the processes employed for solving these problems is neither fatal nor discouraging, because the same condition is met with in making the calculations necessary to the intelligent management of every large industry of the country. The ascertainment of the unit cost of the output of every factory, shop and farm, so as to fix selling prices on a safe basis, involves the apportionment of the value of the property used in common, and the apportionment of the common or overhead expenses, and yet no accountant thinks the problem insurmountable. Cost accounting does not pretend to tell the specific cost of any given unit of production, but the cost of the class to which any unit belongs during an annual or other fixed accounting period can be shown with a degree of accuracy which falls but little short of mathematical certainty. From this the ascertainment of the average unit cost is very simple.

The calculations involved in the safe and sound carrying on of the large life insurance companies,

are not founded on mathematical certainty; they are founded on mathematical deductions from averages, the soundness of which have been tested and tried by long experience until they have become a safe foundation upon which to predicate rules. No one now questions the correctness of these deductions, or the correctness of the tables of mortality used in courts as well as in the insurance business. The tables of mortality could not be used to prove the length of life's span for any given individual, but they show the *average* life of men of a certain class in certain environments which is the highest accuracy of which the subject is capable.

There are only a few of the transactions in our complex civilization in which we are able to determine our rights with mathematical certainty. But while the absence of mathematical certainty in these operations, does not stand in the way of the apportionments which must be made, neither does the difficulty involved in making them correctly, justify the acceptance of a basis for the divisions that is demonstrably unsound, simply because it is simple. Unless the apportionments of value are made on just and proper bases, so as not to unduly or unfairly burden either branch of the business, or either class within that branch, all subsequent calculations are a mere waste of time.

The Master and the Court made the apportionments of value between the passenger and freight business, and between the interstate and intrastate

classes within each branch, on which they called "the gross earnings basis," treating the entire value of the property in the first division, as though all the property was used *in common* between passenger and freight. The process consisted of adding the gross passenger and freight revenues together, and then taking as the *value of the property* employed in the freight business in the state, such proportion of the whole *value* as the gross freight *earnings* were of the total *earnings*.

The division of value between passenger and freight is the most difficult to make because of the lack of a common unit of production in the two branches of the business. It is easy enough to show that the basis used by the court for the division is inherently unsound and illogical, but it is not so easy to point out a basis that is ideal. The proposition being to divide or apportion the value of the property *used in common* on the basis of the relative amount of use made thereof in the passenger and freight business respectively, the first thing that needs to be settled is the unit of output in the two branches of the business.

Quantity in Transportation.

Quantity in transportation can only be ascertained and expressed by first reducing transportation to its units. Freight transportation consists of carrying articles of a certain weight a certain distance. Weight and distance are therefore the two fundamental elements of freight transporta-

tion. By common consent the ton has been taken as the unit of weight and the mile as the unit of distance, and the hauling of one ton one mile is the unit of freight transportation. Multiplying the number of tons transported by the number of miles carried, gives the ton miles, or the quantity of transportation produced by any train, or from any place or within any state during any period. Carrying a single passenger one mile is the passenger unit, and the quantity of passenger transportation produced over any railroad during any given time is shown by multiplying the number of passengers carried, by the number of miles each traveled.

Classifications of freight are made for the purpose of grouping all articles which, from a transportation standpoint, have common characteristics. Different rates are prescribed for the different classes on an arbitrary basis, the relations of the class rates being affected somewhat by the value of the articles and the consequent risk assumed by the carrier in transporting them, the cost of handling, and the ability of the class to bear a greater or less share of the cost of transportation, *and the weight of each that can be handled per car.* Rates are not generally expressed in *tons per mile*, but they are expressed in hundredweights per mile.

There are no other units of transportation and there is no other way of expressing transportation quantities than by giving the number of ton miles and passenger miles. There is therefore no other basis upon which the relative amounts of interstate and intrastate business can be compared.

There has been a disposition on the part of some of the lower courts to disparage ton and passenger miles as bases for comparing quantities, and apportioning cost between interstate and intrastate. But is isn't possible to determine whether interstate or intrastate business is receiving its share of the income, or bearing its share of the cost in a state, unless the *quantity of the business* in each class is made the basis of all calculations. Nor is it possible as a mathematical problem to determine the reasonableness of rates by formulas and computations involving only the revenue, and alleged *percentages* of cost of revenue, disregarding actual cost and actual revenue in each class and the quantities in each class. We will discuss the subject more fully under the head of the division of cost, though there is no reason why the apportionment of *common value* and *common cost of operation* should not be made on the same basis between passenger and freight business, when the relative use of the common facilities has been determined.

It is easy enough to get at the amount of the passenger business, expressed in passenger miles, and the amount of freight business expressed in ton miles, done over any road in the state, but that does not furnish an ideal basis for determining the relative amounts of use of the plant in the two branches, because a ton mile is not the same as a passenger mile, either in the amount of use of the plant, the effort expended in its production or the cost incurred in, or the revenue derived from, its production.

Passenger miles are produced by passenger trains and ton miles by freight trains and there is a lack of unit equivalents upon which to compare them. The comparison, in order to be approximately accurate, must be made on some factor having a close relation to the actual use, and that can only be found in a comparison of the *car and locomotive* mileages and weights in the two kinds of business. It would not do to make the apportionment upon the relative *train miles,* because there is such a difference between an ordinary passenger train, and an ordinary freight train that the manifest unfairness of that basis to the passenger business is apparent at a glance.

To illustrate, the annual reports of the railroads to the state, for the years 1907, 1908 and 1909 are printed in volume one of the record in each suit. Taking for convenience the report of the Great Northern (Case No. 600), for 1908, the report for that year is given last, in volume 1, in that case. The sheet headed "Traffic and Mileage Statistics," being sheet No. 142 (original paging 93 A), shows that in Minnesota in that year the average number of cars per passenger train mile was 5.30; and that the average number of freight cars per freight train mile was 38.46. To treat each mile, made by a train of 5.30 cars, in the passenger business as the equivalent of each mile made by an average train of 38.46 cars in the freight business, in trying to determine the relative amount of use made of the plant, would be obviously incorrect.

So far as the actual wear of the physical plant,—the way and structures—is concerned, it arises from the wheelage and weight of the cars passing over it. Of course the greatest depreciation arises from decay produced by natural laws, but for the purpose of this comparison we are only concerned with the relative use. The car and engine mileage in the trains multiplied by the respective weights, with the locomotive weight and mileage expended in switching in each branch added, would give a reliable and approximately accurate basis arising out of the actual physical use, which is the thing we are seeking. To show the disparity in weights, we refer to the testimony of Mr. Hillman, at page 3344, Vol. 6, Case No. 599, where he states that on the Northern Pacific road in Minnesota the average passenger train weight is 377 tons, and the average freight train weight is 1,110 tons, and the switching movement weight is about 200 tons

But *no information along this line was furnished by the complainants,* and no basis was suggested by or on behalf of the companies, except the gross earnings basis, so that if that basis is shown to be improper and unfair the case is *without proof* on the subject.

It can be said for the ton mile and passenger mile, the units of output, (the numbers of which have been shown), that they arise naturally out of the business, are constant, not affected by external influences, and bear a fixed relation to each other, not subject to serious fluctuation. The revenues of the companies arising from the rates or the fares

TORN PAGES

fixed by law for the *production of the ton miles* and *passenger miles*, on the contrary, are arbitrary, subject to constant fluctuations, and there is no fixed relation between passenger fares, and freight rates. So that if it appears that the ton mile and passenger mile would be an unreliable basis upon which to apportion the value of the property used in common, the same objection, much intensified, would apply to an apportionment made on the gross revenue arising from arbitrary charges made or allowed by law for the production of ton miles and passenger miles. In order to make the gross *freight and passenger revenue*, a better basis for the division than the gross volume of the *freight and passenger business*, it must be made to appear that the relative use of the property is better reflected by the *revenue* than by the *product*, which is manifestly absurd.

Carrying one passenger one mile, under the Minnesota state schedules, would produce two cents, while in the year 1908, carrying one ton of freight one mile on the Great Northern (53 Ward, Vol. 6, No. 600), produced 7.37 mills and on the Northern Pacific (80 Elliott, Vol. 10, No. 599), the same freight service produced 8.714 mills.

If a passenger mile can be produced as cheaply as a ton mile, the passenger fares are manifestly too high. But it is a matter of common knowledge that the production of the passenger mile costs more. There are not so many people to carry as there are tons, nor can as many people as tons be carried in a train, nor are they carried in the same

kind of cars. These facts make the revenue an entirely improper basis for the apportionment, because the unit passenger revenue must necessarily be higher and it therefore results in charging too great a share of the value of the property used in common, to the passenger business. But outside of the question of inherent excess cost in producing a passenger mile, it is manifest that by apportioning on revenue, if passenger rates are relatively higher than freight rates, too great a proportion of the value will be assigned to passenger and too small a proportion to freight, and vice versa; and if any change be made in the rates on either class the *value of the property* employed in the business goes up or down with the rates, and the value of the property, and the profitableness of the business in the branch where the rates and volume of business are in fact unchanged *are similarly affected.*

It is the identical process which this Court condemned when used as a basis for dividing value of property used in common between interstate and intrastate business, in the case of C., M. & St. P. R. R. Co. v. Tompkins, 174 U. S. 167, 176. In that case the trial court attempted to apportion the value of the property used in common between the two classes of freight on the gross revenue basis, and the manifest error in the process was pointed out by this Court, speaking through the late Mr. Justice Brewer, as follows:

> "Suppose the total value of the property in South Dakota was $10,000,000, and the total receipts both from interstate and local business were $1,000,000, one-half from each. Then

according to the method pursued by the trial court, the value of the property used in earning local receipts would be $5,000,000, and the per cent of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one-fifth of what they had been, so that instead of $500,000 the company only receives $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000 divided between the two, would give to the property engaged in earning interstate receipts in round numbers $8,333,000 and to that engaged in earning local receipts $1,667,000. But if $1,667,000 worth of property earns $100,000 it earns 6 per cent. In other words, although the actual receipts from local business are only one-fifth of what they were, the earning capacity is three-fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as $8,333,000 and it earned $500,000 its earning capacity was the same as that engaged in local business —6 per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business in which the rates are reduced."

To show the identity of the method used here, in dividing value between passenger and freight, with the method so condemned by this court, let us suppose that the total value of the property used in common between passenger and freight is $6,000,000 and that the gross earnings in the freight and passenger business are $2,000,000, one-half in each. In that case, according to the method em-

POOR COPY

ployed by the Court below one-half of the gross value would be assigned to each branch, and the gross earnings would amount to 33 1/3 per cent, on the value. If now the passenger rates should be reduced fifty per cent so that the gross passenger earnings would be but $500,000, the freight earnings remaining the same, it would result in assigning to the passenger business but one-third of the common value, or $2,000,000, and would charge the freight business with two-thirds or, $4,000,000, without there being any change whatever either in the quantity of freight handled or the rates thereon. In consequence of the reduction of passenger revenue, the passenger gross earnings would be but 25 per cent upon the value of the property, and, strange to say, the freight earning of $1,000,000 on $4,000,000 value, would also be 25 per cent. So that the percentage of gross earnings to value of both classes of business would in all cases be equally affected by a reduction of the rates in either, without there being any change whatever in the relative use of the property or actual volume of the business. This is therefore a process which the investigator knows absolutely before he uses it, will not produce correct results. The extent of the use made of the property in either branch of the business has no inherent relation to the revenue; the volume of business depends on *natural* or *commercial* considerations affecting the things transported; the revenue depends on the arbitrary sum charged for the service. If the legislature should pass a law requiring all passengers

to be carried free, permitting the companies to charge enough on their freight business to afford a profit on *intrastate business*, under this process in such case, the property would appear to be employed exclusively for freight purposes.

Another fatal defect in the kind of apportionemnt of the value of the property between passenger and freight made by the Master arises from the fact that *all the property is not used in common* in the passenger and freight business. It is an elementary principle in such an apportionment that it must be limited to the property actually used *in common*. In making the apportionment of earnings and expenses between the states, so as to get at the amount of the interstate earnings and the amount of the interstate cost in the state, as well as in apportioning *cost* between passenger and freight, the companies insist that all items that are peculiar to either must be allocated between the kinds of business, or between the localities as to which the division is being made, and only the common items divided. Mr. Martin, the Assistant Controller of the Great Northern, explained the process in his testiomny commencing at page 955, Vol. 3, Case No. 600. After stating that it was an interstate line, he was asked how the accounts were kept so as to show the information with reference to the two kinds of business in Minnesota, he said:

> "The operating divisions of the line are divided into accounting divisions, which represent a train run, or two train runs, on the basis of train runs, or in case of a branch line

an accounting division for the branch. Quite a good many of the accounting divisions are entirely in the state, so that any charges that might be made against such accounting divisions would be generally *actual charges in the state.* For the accounting divisions that cross state lines, as much of the expense is *allocated* to the state as possible from the nature of the expense, and *the common items* that cannot be located are subdivided on some basis that would seem to be the fair one, such as *freight car miles, passenger car miles,* in case for instance as of repairs of cars that you could not allocate to the state, or to the accounting division."

He then stated that there were fifteen accounting divisions on that road entirely in the state, and seven or eight partly in and partly outside of the state. In speaking of the method employed for making the territorial division of operating expenses, so as to get at the amount of operating expenses in this state, he went through the various items showing that all expenses incurred *within* the state were charged to the state regardless of whether the service was inter or intrastate. For example he said at page 958, same volume, as to the apportionment of the account for "station employees":

> "A. The account station employees is one which can be allocated I think in every instance. It is charged according to the station at which the employees are engaged, and of course all Minnesota stations will go to the Minnesota territorial division."

He thereupon went through the entire list of expenses, and showed how everything that is ter-

ritorially allocable is separated from the other expenses and allocated accordingly.

He said at page 978, that 75 per cent of the expenses are actually allocated as between Minnesota and adjacent states and only 25 per cent are *common*, and must be arbitrarily apportioned. Proceeding to the explanation of the method employed by the companies in dividing between the passenger and freight business, he says on the same page:

> "Well, I would say as a general statement, that for this division between freight and passenger we have *in every case where possible, made an actual division*, the same as for the territorial division."

At page 980, explaining the method of allocating specific expenses to freight or passenger, he said:

> "A Under the head of Yard Service. To get this division between freight and passenger all *freight yards of course* are charged to *freight* and all passenger yards exclusively to passenger; but for the common terminals, handling both freight and passenger trains we took a list of the business done, that is, had a test made of the time in service for each class of trains, passenger and freight; got the superintendent from his knowledge of the local situation at each point to confirm the result, so that a percentage was made for each individual point according to the service rendered —I believe ten days was used to get the basis— so that for instance at a place like Barnesville which handles both freight and passenger trains in the terminal yard, it might be that the test showed that the passenger service ought to be ten or fifteen per cent (I don't remember the percentages at each point), but arrived at in that way."

* * * * *

He further said that engine service on mixed trains is divided arbitrarily according to a circular issued by the Interstate Commerce Commission "one-fourth passenger, and three-fourths freight."

All accountants agree, where divisions of this kind have to be made, that allocation, wherever possible, is a necessary part of the process.

Mr. Martin, in his testimony at page 979, after explaining the process of making allocations, in dividing cost between passenger and freight, referred to the subject of operating joint yards and terminals.

It appeared in the "valuation" that the Great Northern road owned one-ninth interest in the St. Paul Union depot and one-tenth of the Minnesota Transfer, and that the Northern Pacific is the exclusive owner of the Duluth Union depot, the Great Northern having the right to use the same. He explained that these facilities are *not* used in common *between passenger and freight,* they are in each instance either *exclusively freight* or *exclusively passenger.* He said: "I believe that divides itself actually in every case. I don't recall any joint service; *the Saint Paul Union depot is passenger; the Duluth Union depot is passenger, and the Minnesota Transfer is freight.*"

He further testified, at page 977, that the Minneapolis Western Railway is a separate company which operates the tracks serving the flour mills on the west side of the Mississippi River in Minneapolis, and is used *exclusively in the freight business.*

Exhibit 2, Hogeland (3rd page) appearing in volume 6, (No. 600), values the Minneapolis Western Railway at $877,325. Exhibit 2 Darling, Vol. 10, Case No. 599, shows the separate valuations of the one-ninth interest in the Saint Paul Union depot, $610,572, and the one-tenth interest in the Minnesota Transfer, $575,600. The Master allowed substantially the amounts claimed on each of the properties, but his findings grouped them so that to get at the separate values we must go to the exhibits. These findings mean that the Minnesota Transfer, *an exclusive freight yard and facility*, was worth in round figures $5,756,000, and that the St. Paul Union depot, an exclusive passenger facility, was worth $5,493,319; and the Minneapolis Western Railway, *an exclusive freight facility* of the Great Northern was worth $877,325.

The master finds, page 235, Vol. 1, Case No. 599, that the value of the *freight car equipment* of the Northern Pacific system for Minnesota was $7,519,722, while passenger car equipment was only $1,349,829. On the Great Northern (page 237, same volume), the Minnesota portion of the *freight car equipment* was $12,411,265; while passenger car equipment was only $1,886,178. There is in each a miscellaneous equipment such as snow plows, ballast cars, steam shovels, boarding cars, water cars, etc., that are not apportioned between passenger and freight. They were apportioned between states on a mileage pro rata. Locomotives on the Northern Pacific were value at $3,454,040, and on the Great Northern at $5,469,270, but not apportioned

In the Minneapolis & Saint Louis case the freight *car equipment* was valued (page 238, same volume) at $1,998,345, and the passenger car equipment at only $341,006.

It is clear therefore that in assigning values between passenger and freight the first step necessary upon any theory would be to allocate to passenger, the facilities and equipment used *exclusively* in that business, and to freight, the facilities and equipment used therein exclusively. We do not pretend to enumerate all the facilities that were thus assignable to one branch or the other, but there can be no doubt that the freight car equipment, the one-tenth share in Minnesota Transfer, the entire value of the Minneapolis Western Railway, amounting in the aggregate to over $14,000,000 in the Great Northern case, should have been assigned or allocated to freight, and not treated as *property used in common* and divided in such a way as to assign a part of the value thereof to the passenger business.

There were many other extensive yards and facilities used exclusively for freight which should have been segregated and allocated to freight. The Great Northern has *extensive and valuable yards at Como*, in Saint Paul and others in Minneapolis, used only for freight, and the Northern Pacific has similar exclusive freight facilities in both cities. At page 1104, Vol. 3, Case No. 600, Mr. Ward explains how freight trains are made up at the Twin Cities for the West and how all these facilities are used. The exclusive passenger equipment, and the

POOR

value of exclusive passenger stations should also have been allocated to passenger. The property actually used *in common* only should have been apportioned on sound bases and such course would have given a result very different from that reached by the Master.

Why Unfairness to Passenger Business is Advantageous to Company.

The reason is not apparent at first sight why it is of advantage to the railroads to have the primary division made on a basis which is so unfair to the passenger business.

But interstate rates or earnings are not involved, and it is perfectly clear, if an unfair portion of the *common value* can be placed on the passenger business of the state, that on a redivision between interstate and intrastate the state's passenger rates will be imperiled. This is, however, only a part of the process; the passenger business is also charged with an undue share of the cost, when the *common* operating expenses of the two branches are later divided by the companies. In order to offset the advantage to the intrastate freight rates arising from this double injustice to the passenger business, the companies have brought forward a formula for loading *intrastate* freight business with a burden of "relative" cost as compared with interstate, sufficient to also imperil the intrastate freight schedules. The other part of this system of apportionment will be found under the head of the division of the cost of operation.

COPY

THE TRIAL JUDGE MISTAKENLY THOUGHT THE APPORTIONMENT OF VALUE MADE BY THE MASTER WAS BASED ON "THE VALUE OF THE USE."

One of the unsatisfactory explanations of its decision, made by the court below, is the statement appearing in its opinion, at page 426 of Vol. 1, (Case No. 599), in reference to, and in justification of, the basis upon which this division of the value of the property used in common was made between passenger and freight. The Court says:

> "The issue is between the apportionment by use, without regard to the worth or value of the use, and apportionment according to the *value of the use.* The latter basis seems to be the more logical and rational. Capitalization is founded on the worth of the use, not on mere use. The value of property and of investment in every form is measured by the value of the use, not by the use divorced from the value thereof."

The Court concedes that the apportionment should be based on the relative use, and should be made on the basis of the use itself, or "the value of the use." But the ultimate problem before us is to determine the extent of the use in each class of the property used in common between interstate and intrastate business, so that we may be able to ascertain the "value of the use." *This division* must be made in seeking that result, not for the purpose of fixing a commercial value upon private property, in which calculation the income would be a proper subject for consideration, nor for the purpose of showing whether *passenger and*

freight rates are properly related, but solely for the purpose of furnishing a *basis* for the subsequent division between *interstate* and *intrastate* business, in order to ascertain the relative use made of the property in those two classes.

There is no question involved in *this division* concerning in the remotest degree the "value of the use." These suits are founded on the proposition that the *use* of the railroad property employed in *intrastate* business is being taken without paying the proper *value* therefor. We must therefore ascertain by these apportionments the value of the property *so used* as the first step in determining what the *value* of that use is. The companies say that under these rates, *after paying operating expenses, the net* revenue is insufficient to afford a reasonable return for the *use* of the property. While the sufficiency of the gross earnings is challenged, it is the adequacy of the net earnings that is in issue. The companies theoretically get no compensation for the *use* of the property out of *operating expenses.* As a matter of fact, with no supervision over operating expenses, money can easily be, and much money is, diverted from legitimate operating cost and used for expenditures which should be met from capital; but ignoring for the present that phase of the subject, it is not claimed that the rates are insufficient to pay operating expenses. It is the part of the revenue remaining after operating expenses are paid, the part collected for *the use of the plant,*

and available for interest and dividends, that is said to be deficient.

In this first division where the purpose is to get at the relative use made of the property between passenger and freight as a state proposition, the interstate and intrastate business in each branch must be consolidated. The *state* revenue in each branch necessarily includes both interstate and intrastate revenue. The sufficiency of the intrastate part of that revenue is challenged and the sufficiency of the interstate part is admitted. Nothing could be more unreasonable mathematically in this case, in seeking the amount of the respective uses, than to disregard the use itself and take the arbitrary revenue,—part of which is challenged, and claimed to *not* be the *value of the use*,—and declare that it *is* the *value of the use* and that the extent of the use can be determined on the basis of its so-called value. If we could assume that the *revenue* derived from the challenged rates is *the value of the use* of the property this apportionment of the *value of the property* would not be necessary. If the companies are receiving the value of the use of this property they cannot allege confiscation. It is evident from the foregoing language that the Court did not understand the purpose of this division or apportionment of value, and for that reason inadvertently upheld the false basis upon which the same was made. The court was also misled into treating all the property as though it was used in the two branches *in common*, instead of prop-

POOR

erly allocating the parts thereof used exclusively in one branch or the other.

The Court further said, in the same connection, in regard to the alleged "value of the use":

> "The Minnesota Commission, the railroad companies, all rate makers, base their rates primarily on the worth of the use of the railroad machines by the various classes of freight, and by the passengers, and not on the amount of the use. The rate for hauling a ton of merchandise of the first class a mile is not five times the rate for hauling a ton of merchandise of Class E a mile, because the former ton mile uses the railroad property five times as much as the latter, but because the use by the former is *worth more* than the use by the latter."

The difference between the ton mile rate on first class merchandise and the ton mile rate on class E has no pertinency and wholly fails to support the court's argument. The first class ton mile merchandise rate is five times the ton mile rate on class "E," not because of any imaginary greater or more valuable *use of the railroad property* in hauling the same, but entirely because of the greater *cost* to the company *of handling the property at stations*, and the *greater amount of space* which such property takes *in the cars* in proportion to its *weight*.

As everything is carried by weight, it needs no argument to demonstrate that lighter articles, which take more car space according to their weight, must pay a higher rate in order that the railroad company may get out of their haulage the

COPY

same profit per ton mile, or in other words the same "value of the use" of the railroad facilities.

All freight rates are supposed to afford the same return for the same amount of use of the property per ton mile, but elements of extra cost in the handling, as well as extra space in the cars, and to some extent the extra risk on account of value, must be taken into account when the rates are made, and collecting what it costs for these extra expenses in the form of higher rates is not getting more money for the "use" of the physical railroad property.

Mr. Johnson, the assistant controller of the Northern Pacific, explained this matter of extra cost and extra car space, at page 4221, Vol. 8, record (No. 599), where he said:

> "It cannot be questioned that *it costs more* per ton to transport dry goods than it does coal, because the handling of dry goods involves the expenditure for trucking, etc., at stations that is not required in the transportation of coal, *and the same weight per car cannot be handled.*"

Discrepancies in rates between different classes or kinds of traffic are allowed because of those differences, and not on account of any imaginary differences in the "value of the use" of the physical property of the railroad. There are too many arbitrary and extrinsic elements, including many special items of expense, entirely outside the actual use of the physical property of the road, which enter into the rates, and consequently into the *gross* revenue, to make either rates or gross revenue a measure of the use. The *use of the plant,* in rate

POOR C

making is constant, the other elements are all fluctuating.

WHAT RATES, FARES OR THE GROSS REVENUES REPRESENT.

In addition to the way and structures a railroad comprises the equipment for the passenger and freight business, the miscellaneous equipment, the organization consisting of a full corps of officers and men. The revenue derived from rates must not only pay for the use of the way and structures, but it must pay for the use of the special equipment; it must pay the wages of employees and salaries of officers; it must pay for the maintenance and (according to railroad practices) *the improvement* of the property; it must pay the taxes on the property, and if honestly financed, the interest on the bonded debt, and a dividend on the stock. Keeping in mind that the value of the use of the special equipment is properly not to be divided in the problem with which we are now confronted, that there has been no *valuation* of the officers or the men, for the value of whose services a part of the rates and fares are imposed; that the cost of maintenance, taxes, interest and profit—all of which are included in the rates—are for the purpose of this division *not to be apportioned*, it can be seen how inaccurate is the statement of the court, that the *gross* revenue represents the "value of the use" of *that part* of the way and structures which is *used in common between passengers and freight.*

COPY

If revenue could under any circumstances be a proper basis for making apportionments of the value of the property it should be the *net revenue,* and not the *gross,* because there should at least be deducted from gross revenue the part thereof collected for purposes other than compensation for the "use" of the plant, before it could be claimed that the *revenue* represented in any just sense the "value of the use" of the property.

How Railroads Divide Common Items Between Themselves.

If the complainants who are urging the use by the court of this "revenue basis" for apportioning values, believe that the gross revenue reflects the relative use of facilities that are used in common between different branches of the business of the same company, why do they not use *gross revenue* as a basis for apportioning expenses for the use of facilities used in common between different railroad companies?

The Minnesota Transfer is an immense freight yard between St. Paul and Minneapolis, made necessary because these two cities are a gateway for so much transcontinental business. All interstate freight is received at and forwarded from this yard, whether carload or l. c. l. A part of the merchandise shipped from these cities is either loaded at, or switched to, those yards to be placed in trains. The property is owned by an independent company, and valued by the Master at $5,756,000. Each of

POO

the ten railroads in the state own a one-tenth interest in the property, and all use it in common in their business. They each pay a share of the cost of maintenance, and a share of the interest on its bonds, but they *do not* make the apportionment either on their stock ownership, or on the "revenue" from the business.

Mr. Ward of the Great Northern, in his testimony, at pages 1105-1108, Vol. 3, describes the manner in which this Transfer is used, and in explaining how the expense of the maintenance and interest on the bonds are paid, he says (p. 1106):

> "All of the tonnage passing through these terminals is counted, both for the road which brings the tonnage in and the road which takes it out, and the total expense of the Minnesota Transfer is apportioned among the roads that are members of the company, in the proportion that their *tonnage* bears to the total."

Mr. Martin, the assistant controller of that road, in his testimony at page 955, of the same volume, describes how items that cannot be allocated in dividing between states, are apportioned on some fair basis, such as *"freight car miles—passenger car miles"*; but although there are many complex operations explained for dividing common items, nowhere is a division made by the companies on the "gross earnings" basis. Such divisions are always made by them on *wheelage* or *tonnage*.

We have already shown that interstate revenue is apportioned between states on a mileage pro rata basis.

R COPY

The *train mileage* is used by the companies as a basis for making some divisions of cost, and, in dividing between states so as to show the proportionals of the costs of business carried on the same trains, it is fair. We have shown that the difference between the number of cars in freight and passenger trains makes it an impossible basis for dividing between *freight* and *passenger,* because it does not reflect the relative use. But if the disparity in the number of cars in a train were not involved, that is if the trains were of the same relative number of cars and weight, the basis would be fair. That disparity can be avoided only by a comparison of the car and engine mileage instead of the train mileage. A freight train of thirty cars would make three times as much *car* mileage as a passenger train of *ten* cars, in going the same distance, while the engine mileage would be the same per train.

We have from the reports to the state of the two principal roads—printed in the record—the car and engine mileage in the freight and passenger business, respectively, in the state. The statistics for the Great Northern are found in the report for 1908, included in Volume 1 of the record in that case, (No. 600) and the report in the Northern Pacific case for the same year appears in Volume 1 of its record (No. 599). They are as follows:

GREAT NORTHERN.

Locomotive Mileage.

Revenue Service—		
Freight locomotive, miles	3,323,017	
Passenger locomotive, miles	2,958,576	
Mixed locomotive, miles	141,527	
Special locomotive, miles	5,327	
Switching locomotive, miles	1,396,736	
Total in revenue service		7,825,183
Non-revenue service locomotive, miles		443,237

FREIGHT.

Revenue Service—		
Freight car miles,		
For loaded	92,976,075	
For empty	32,796,151	
For caboose	3,390,948	
Total		129,163,174

PASSENGER.

Passenger car miles	7,213,112	
Sleeping, parlor and observation	3,311,063	
Other passenger train cars.	5,593,195	
Total		16,117,370

SPECIAL CAR MILES.

Freight, loaded	46,731
Freight, empty	214
Caboose	2,696
Passenger	7,181

COPY

Sleeping, parlor and observation	5,842	
Other passenger train cars	5,819	
Total		68,483
Total in revenue service		145,349,027
Non-revenue service car miles		6,817,978

In giving the locomotive mileage there is some of it ascribed to mixed trains, and without some information on the subject it might be difficult to find what proportion of the mixed train locomotive service to assign to the passenger and the freight business respectively.

But at pages 980 and 981 of the Great Northern Record, Mr. Martin, the assistant controller of that company, testified that the Interstate Commerce Commission had established a rule with reference to the division of mixed train miles between passenger and freight, which the companies follow by arbitrarily assigning such trains one-fourth to passenger and three-fourths to freight.

We find from the foregoing 1908 report of the Great Northern road to the state, that the revenue freight car miles in the state for that fiscal year, including loaded, empty and caboose, is 129,212,815. That the revenue locomotive miles in the freight business for the same year for Minnesota was 3,323,017. Three-fourths of the mixed and special revenue locomotive miles, (assignable to freight), was 110,147, making in all 132,645,979.

The Record also shows the revenue passenger car miles, including sleeping, parlor, observation

POOR

and all other cars used in the passenger business, 16,117,370. The special passenger car miles, for similar classes of cars, was 18,842. The revenue passenger locomotive miles was 2,958,576. One-fourth of the mixed and special locomotive miles, (assignable to the passenger business), was 36,-714. We then take the revenue switching locomotive mileage and divide it between passenger and freight by assigning 93% to freight and 7% to passenger service, which is substantially the apportionment made by the company. This would add to the freight mileage 1,298,964, and to the passenger mileage 97,772, making the total car and locomotive miles chargeable to freight 133,944,943 and the total car and locomotive miles assignable to passenger service 19,228,272. Total for both, 153, 173,215.

Of this total, the car and locomotive mileage in the passenger service is 12.6%, and the car and locomotive mileage in the freight service is 87.4%.

NORTHERN PACIFIC.

Locomotive Mileage.

Revenue Service—

37. Freight locomotive, miles 2,342,745
38. Passenger locomotive, miles 1,961,917
39. Mixed locomotive, miles 149,000
40. Special locomotive, miles 5,329

COPY

41.	Switching locomotive, miles	1,434,365	
42.	Total in revenue service.		5,893,356
43.	Non-revenue service locomotive, miles		619,258

Car Mileage.

	Revenue Service—		
44.	Loaded	59,041,553	
45.	Empty	15,718,440	
46.	Caboose	2,105,579	
47.	Total		76,865,552

Passenger Car Miles.

48.	Passenger	5,342,375	
49.	Sleeping, parlor and observation	2,665,315	
50.	Other passenger train cars	3,767,239	
51.	Total		11,774,929

Special Car Miles.

52.	Freight, loaded	19,280	
53.	Freight, empty	3,144	
54.	Caboose	1,200	
55.	Passenger	6,939	
56.	Sleeping, parlor and observation	1,464	
57.	Other passenger train cars	983	
58.	Total		33,010
59.	Total in revenue service		88,673,491
60.	Non-revenue service car, miles		1,342,065

The same process applied to the Northern Pacific statistics, as applied above to those of the Great Northern, gives the proportions of a car and locomotive mileage as follows: Freight service, 86.4 per cent; passenger service, 13.6 per cent.

It should be understood that the references to "revenue service" and "non-revenue" service, mean respectively service rendered *for the public,* and service rendered *for the company.*

Every movement of equipment is either revenue or non-revenue service, whether it consists of hauling loaded cars, or empty cars or trains to places where they may be loaded. Unless the service is performed for the company, in hauling its men, or its coal, construction material, or other company property, it is "revenue service."

The percentages of the gross revenue as found by the Master were: Northern Pacific (page 204, Vol. 1, Case No. 600), freight 76.66 per cent, passenger 26.34 per cent; Great Northern (next page, same record), freight 78.6 per cent, passenger 21.4 per cent; Minn. & St. Louis (page 230, same record), freight 72.51 per cent, passenger 27.49 per cent.

The percentages of *net earnings* on the Northern Pacific (Ex. 80-Elliott, Vol. 10, Case No. 599), freight 86.4 per cent, passenger 13.6 per cent; the ton and passenger mile relation would be (80 Elliott, supra) freight 87.7 per cent, passenger 12.3 per cent.

The data appearing at pages 222 to 225, Vol. 1, Great Northern case (No. 600), shows that taking

all earnings of the road into account the Master found the total net earnings of that road in the state were $8,180,025.11, of which $7,499,231.51 were net freight earnings, and $680,793.60 were net passenger earnings. Assuming those figures to be a correct statement of the net earnings, it would give a percentage relation between passenger and freight of 91.7 per cent freight, and 8.3 per cent passenger. The ton and passenger mile percentage would be (53 Ward, Vol. 6, No. 600), freight 91 per cent, passenger 9 per cent.

It will be noted that the car and engine mileage percentages, the ton and passenger mile percentages, and the net earnings percentages are nearly the same. To show the injustice to the passenger business of using the gross earnings as a basis for the apportionment, it will be sufficient to contrast that method with either of the others. We will therefore use the gross earnings, and the car and engine mileage basis as applied to the Master's "Cost of reproduction," and the *actual cost of construction of the two principal roads*, the Northern Pacific and Great Northern.

NORTHERN PACIFIC..

Master's "cost of reproduction".....$90,204,545

Apportioned on "gross earnings" basis—

Freight, 73.661 per cent.....$66,445,570

Passenger, 26.339 per cent..... 23,758,975

Apportioned on car and locomotive mileage:

Freight, 86.4 per cent.....$77,936,728

Passenger, 13.6 per cent..... 12,267,817

Master's "original cost" (p. 241, Vol. 1, record), $65,571,462 apportioned "gross earnings method":

Freight, 73.661 per cent.....$48,299,949

Passenger, 26.339 per cent..... 17,271,513

Apportioned on car mileage, etc., basis:

Freight, 86.4 per cent.....$56,653,744

Passenger, 13.6 per cent..... 8,917,718

GREAT NORTHERN.

At page 319, Vol. 1, Great Northern record (No. 600) by an amended finding, the Master stated the outstanding capital of the Great Northern road at the time the action was commenced as follows:

Capital stock $149,577,500

Bonds 83,119,939

Total capitalization $232,697,439

Apportioning this capitalization on a mileage basis would assign to Minnesota 32.6 per cent, $75,859,365.

The construction cost of the road as shown by its books, after deducting certain concededly fictitious items, by the state's expert (see exhibit Hillman-Kl-k7, Vol. 5 Case No 600, and the testimony in explanation thereof appearing at pages 1764-1910, Vol. 4, same case), show figures very close to the above stated capitalization. The Master in finding cost of construction, took an excessive figure as a starting point, and deducted only a part

of the fictitious items explained by Hillman. His result is disproved by the report of the company to the state for the year 1909 (included in Vol. 1 of the record). The company had then taken over all of the properties it had theretofore actually owned but operated under 999 year lease, and it gave a statement of the total cost of the road and its equipment up to June 30th, 1908, as $239,899,079.94. Thirty-two and six-tenths per cent of this would be in round numbers about $77,000,000.

But there is no theory upon which there could have been more expended than is shown by the capitalization. Capitalization has always been rejected as a measure of value, because not accompanied by proof that it represented *actual money invested*. It must, however, at least represent the maximum of the money put into the property, and if we take the state's share of the capitalization, and for the sake of simplifying the computations call it $76,000,000, we will be on safe ground as far as the company's rights are concerned. We will now make the apportionment of the several "values" of that road on the percentage relations above referred to:

Master's "cose of reproduction".....$138,425,291

Apportioned on gross earnings basis:

Freight, 78.6 per cent.....$108,802,279

Passenger, 21.4 per cent..... 29,623,012

Apportioned on the car mileage, etc., basis:

Freight, 87.4 per cent.....$120,984,705

Passenger, 12.6 per cent..... 17,440,586

Master's "cost of construction" (p. 197, record), $96,271,255, apportioned on the gross earnings basis:

Freight, 78-6 per cent	$75,669,207
Passenger, 21.4 per cent	20,602,048

Apportioned on the car mileage, etc., basis:

Freight, 87.4 per cent	$84,141,077
Passenger, 12. 6 per cent	12,130,178

Actual cost of road in Minnesota (maximum) gross earnings basis:

Freight, 78.6 per cent	$59,736,000
Passenger, 21.4 per cent	16,264,000

Actual maximum cost, car mile, etc., basis:

Freight, 87.4 per cent	$66,424,000
Passenger, 12.6 per cent	9,576,000

The excess value assigned to the passenger business by use of the gross earnings basis of apportionment, on either "valuation" of the property, is very apparent, and the destructive effect of such excess on intrastate passenger revenue is revealed when the net profit from intrastate passenger business is sought to be shown, in a later computation by the Master.

The complainant is responsible for the absence of satisfactory evidence on this, as on other portions of these cases, and it is no justification for the use of an improper rule, on a subject that so seriously affects the ultimate result, to say that there was no evidence offered specifically outlining the correct rule. There was evidence from which many differ-

ent rules could have been formulated, and the one arbitrarily adopted by the Master is the one most unfair to the state. It is clearly indefensible because of its inherent unreasonableness, and because it gives results that are demonstrably false.

In the case of Knoxville v. Knoxville Water Co., 212 U. S. 1, this Court clearly defined the status of the report of a master in this case as follows, p. 8:

> "In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a *master, even though they be confirmed by the trial court.* The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts in each case. Nothing less than this is demanded by the respect due from the judicial to the legislative authority. It must not be understood that the findings of a master confirmed by the trial court, are without weight, or that they will not as a practical question sometimes be regarded as conclusive. All that is intended to be said is, that in cases of this character this court will not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation."

In as much as the court has reserved to itself the right, when necessary, to find the facts, in actions where legislative power is sought to be restrained by judicial decree, we feel that the court will accord but little weight to this apportionment of value, the basis of which is a mere arbitrary formula. When the unreasonableness and injustice of this rule were pointed out by exceptions in the

POOR

court below, the only reason given by the learned trial judge for upholding it was as stated, that it was an apportionment of value made upon "the *value* of the use." We believe that we have demonstarted the fallacy of the claim that the gross passenger and freight earnings represent the *value of the use of the part of the property used in common between passenger and freight.* It is manifest error to claim that the "value of the use" of railroad property is reflected by the revenue derived from challenged rates, in a process which ultimately results in proving that such revenue is not the real "*value* of the use," of the railroad property.

This court has already rejected the "gross earnings" basis for apportioning the value of railroad property used in common between interstate and intrastate business, in the Tompkins case, supra, and in doing so, clearly pointed out its mathematical unsoundness. There is no justification offered in these cases for the attempt to use it again, in the face of that condemnation, and the insistence upon its use by the complainants in the court below, can only be accounted for on the ground that they knew its unfairness to the passenger business would be a substantial aid in ultimately discrediting all the challenged rates, by diminishing *intrastate* revenue.

The rules for making the apportionments of value and operating expenses which may be laid down in these cases, will be of the utmost importance not only in these but in all other similar cases. They are almost as vital as the basis for the valua-

COPY

tion of railroad property, and will affect the civic rights of all the people of the country. On behalf of the State of Minnesota we only ask that the rules to be applied shall be founded upon reason and justice, and if the rates involved will not stand the test of such rules the state will be satisfied that they should go down.

We believe this court will be reluctant to formulate rules where there is any doubt under the evidence as to what they should be. We have demonstrated, that as a basis for making this apportionment, net revenue would be fairer and more reliable than gross revenue, but we do not feel that either gross or net revenue would be a scientific basis. Some basis founded upon use not on revenue should be adopted. The property that is used in common in the two kinds of business is so used only in running trains over it; therefore, if the wheelage of the trains can be equalized by taking the car and engine mileage instead of the train mileage, a start will have been made toward a proper basis upon which relative use can be ascertained.

If this were a case where one of several bases, each equally reasonable, might be taken, and one of them would operate to place upon the intrastate business conspicuously larger burdens than any of the others, the respect due to legislative authority, as well as the presumption in favor of the rates, would suggest the adoption of a basis less drastic than the one most extremely adverse to the state.

We have shown that the gross revenue basis is not only the most adverse to the state, but is also the least reasonable. We believe this court will not overthrow state legislation, the validity of which depends on facts susceptible of proof, except where it is compelled to do so by the clearest possible showing. The complainants in these cases have not attempted to make a clear showing. They have not furnished either the state regulating officers, or the court in these cases, with the controlling facts within their knowledge. In this and the other apportionments which we will be obliged to refer to later in this brief, their course falls nothing short of deliberate concealment of the facts. Evasion, concealment and disingenuousness will not be favored by a court of equity, and that is especially true as against suitors asking one branch of the government to restrain another branch thereof from exercising government powers.

The Court will not fail to notice the readiness with which railroad accountants can find reliable factors upon which to make the difficult apportionments of expense both in the passenger and freight business, between state, and how easy it is for them to find a basis for the apportionment between themselves of expense of maintenance and income upon yards and terminals used by them in common. In none of these operations, nor in apportioning *revenue* between states, is it possible to reach *mathematical exactness*. The same processes thus employed, based on the appropriate factors, could be used with the same accuracy in making these apportion-

ments of value between freight and passenger business, and between interstate and intrastate business within a state, so as to furnish intelligent information upon which public regulation could be based. But when it comes to these questions, that would afford information to the public for rate making purposes, all accounting is abandoned, and is claimed to be impotent. They excuse the failure to keep these accounts by saying it can't be done "with mathematical exactness," and in litigation of this kind they trifle with the state governments and the courts by suggesting, instead of accurate statements of account, formulas based on revenue, or self-serving "opinions" upon which to apportion the value of the property and the operating expenses. It is especially noticeable that when they abandon accounting, and employ arbitrary processes, the results are always favorable to their contentions.

POOR

(B) APPORTIONMENT OF VALUE BETWEEN INTERSTATE AND INTRASTATE.

After the value of the property employed in the passenger and freight business respectively is ascertained by apportionment it must be reapportioned in each branch between *interstate* and *intrastate* business.

It is at once apparent that the finding of a basis upon which to make this apportionment is simple, as compared to finding a basis of apportionment between passenger and freight. In that apportionment we lacked identical units of production by which to measure the respective volumes of the business. In that apportionment also we were confronted with conditions which required the allocation to one branch or the other of practically all of the equipment, and a very large part of the way and structures. But, if by proper allocation and apportionment, the value of the parts used in the freight and passenger business respectively were found, there could be no allocation of any part of the value so found between interstate or intrastate business. The property actually used in carrying passengers and the property actually used in hauling freight, is *all* used in common between interstate and intrastate business. The complaints allege, and it is self evident, that there is no inherent difference between commerce within a state and commerce between it and its sister states. There is the same proportion, according to its volume, of high class and low class freight in in-

COPY

terstate and intrastate business, and in a given number of ton miles in either class there would be substantially as many tons of first class merchandise, paying the highest rate and taking the greatest amount of car space per ton, and of brick or sand, paying the lowest rate, and taking the least amount of car space per ton.

The *intrastate business* of Minnesota does not consist exclusively of carrying the *domestic products* of the state. Minnesota has three large cities where extensive wholesaling is carried on, and an innumerable number of smaller cities where retail merchandising is carried on extensively. Most of this merchandise is produced at Eastern factories, or in foreign countries, and must come into the state as interestate business. When transshipped, however, from local jobbers to interior stations it moves as intrastate business. Therefore the intrastate business may include products from any state in the Union, or from any country in the world. The gross number of ton miles includes all business handled, and in no manner indicates the relative quantities of the different classes carried. The same is true of the gross freight revenue; it includes all the money received for handling the gross number of ton miles of freight hauled, but it does not indicate in any manner the kind of traffic from which it was derived, the kind of train upon which it was carried or the rate it paid. The same is true of the passenger business; the gross number of passenger miles indicate the total service, and the gross pas-

senger revenue indicates the whole amount received therefor, without regard to the rate for any passenger mile.

To ascertain what the average passenger mile or ton mile revenue is, we do not look to the tariff of fares or rates at all. We get the ton mile revenue by dividing the gross freight revenue by the number of ton miles, and the passenger mile revenue by dividing total passenger revenue by the number of passenger miles.

The inherent homogeneity of the interstate and intrastate business as to both passenger and freight, is alleged in the complaint, was found as a fact by the court below, and is not and could not be successfully disputed by any one. It follows as a necessary corollary that the number of ton miles of interstate and intrastate freight respectively show the actual amount of the output produced in each class of business, in homogeneous units, and correctly show the relative use made of the property used in common, in carrying on interstate and intrastate freight transportation. The correctness of the basis is not affected by the fact that some of the business was carried on "local trains" and some of it on "through trains," and that some of it earned higher unit revenue and also incurred higher unit cost than other parts, and that these diversities are not reflected in the ton miles. The diversities in cost, arising from the different kinds of train service, must be taken care of in the apportionment of *operating expenses* hereafter to be discussed; it is in the main an extraneous cost,

mostly for labor, not arising out of the common use of the plant. These diversities in cost are provided for in the tariff of rates, higher rates being allowed for the articles that are most expensive to handle, and only the traffic itself is necessary to be considered in reducing the business to the *average unit output, the ton mile.* Neither the gross revenue nor the ton mile revenue reflect any of the diversities referred to, any more than do the ton miles themselves. Gross freight revenue is the whole amount received for handling all of the ton miles, and *the ton mile revenue* is the *average* revenue for one unit of output, but not the specific revenue for any particular ton mile. All diversities attending the production of the gross revenue are absorbed in the process of averaging it so as to get at the ton mile revenue. All that has been said about the averaging of production and revenue in the freight business applies also to the passenger business.

The Master distinctly found that the intrastate ton mile revenue was very much greater than the interstate ton mile revenue. In the Northern Pacific case (p. 217, Vol. 1, Case No. 600) the excess intrastate ton mile revenue over interstate was in the fiscal year 1908 as 1.4387 to 1; in the Great Northern case the relation of intrastate ton mile revenue to interstate ton mile (page 223, same volume), was as 2.02894 to 1.

It appears from exhibit 54-Johnson (Vol. 10, Case No. 599), that the intrastate freight business of the Northern Pacific Company expressed in ton

miles was but 12.33 per cent of its freight business in the state; and from exhibit 20-Parker (Vol. 6, Case No. 600), it appears that the intrastate freight business of the Great Northern Company in ton miles, was but 8.07 per cent of its entire freight business in Minnesota.

The Master also found from the evidence, on account of the excess unit intrastate revenue above mentioned, (p. 204, Vol. 1, Case No. 600), that the *intrastate freight revenue* on the Northern Pacific was 16.356 per cent of the total state freight revenue; and on the Great Northern the *intrastate freight revenue* (p. 206, same volume) was 15.112 per cent of the total freight revenue in the state.

He thereupon in both cases, (same pages of record last above referred to) apportioned the value assigned to the freight business in the state, between the interstate and intrastate business on the *gross revenue percentage relation*, instead of on the percentage relation of the respective *ton miles of business*. The Master's apportionment requies 12.33 per cent of the business in the case of the Northern Pacific, to pay a return on 16.356 per cent of the value of the property used in common; and in the Great Northern case requires 8.07 per cent of the business, pay a return on 15.112 per cent of the value of the property used in common. No excuse or explanation can be given for making this apportionment on relative *gross revenue*, instead of on relative ton miles, except that using the revenue, which is a manifestly improper basis, *assigns a greater proportion of the value to intra-*

state business, than would the ton mile or true basis. It is simply a process for overloading the intrastate business, and making it bear a part of the burden of interstate business. If the ton mile revenue on intrastate business were less than on interstate, as the complaints allege it to be, we would no doubt find complainants insisting on having this apportionment made on the ton mile basis.

Here again the most extreme method was employed, in order to burden intrastate business. This apportionment on relative gross revenue, instead of on relative ton miles cannot be justified on the ground that intrastate business is inherently more *expensive* than interstate, because the excess operating cost incurred in handling intrastate business is all taken into account in apportioning operating expenses.

All that has been said in derogation of the gross earnings, as a basis for making the apportionments of value, applies to this apportionment even more strongly than to that between passenger and freight. The absence of a manifestly correct basis on which to make the former apportionment, lent to the gross earnings as a basis, the scant grace of being simple. Here the simple, direct and unimpeachable basis was disregarded by the Master, to the serious and visible detriment of the rates involved. The trial court's statement with reference to the gross revenue reflecting *the value of the use* of the plant, is as inapt as to this apportionment as to the other, because in the apportionment of operating expenses made later, the trial court

claims that the *excess ton mile revenue* on interstate business is insufficient to pay the excess ton mile operating expenses incurred thereon, and that the *net* intrastate revenue to apply, on the use of the plant, is insufficient to pay a reasonable return on the portion of the property used in that business. The condemnation of the gross revenue basis, made by this court in the Tompkins case, supra, applies directly to this apportionment, because it was this identical apportionment that was there sought to be made by that method. Changes in gross revenue occur without regard to any change in the volume of the business, or the resulting change in the relative use of the property. Arbitrary changes in revenue might result from different rates put in by the voluntary act of the companies or because of different tariffs prescribed by public authority.

The share of "the cost of reproduction" assigned to freight in the state, by the Master in the Northern Pacific case (same pages of record last above referred to) was $66,445,570. Intrastate share apportioned on revenue 16.35 per cent, is $10,867,837
Apportioned on ton miles, 12.33 per cent thereof would be 8,192,738
Excess of value charged to intrastate on "revenue bases" $2,675.099

The share of the "cost of reproduction" assigned to freight in the Great Northern Case (page 206, above mentioned record) was $108,802,279. The intrastate share, apportioned on revenue 15.11 per cent, is $16,442,200

Apportioned on ton miles, 8.07 per cent thereof would be only	8,780,343
Excess "value" charged to intrastate on "revenue basis"	$7,661,857

The excess "value" of the property thus assigned to intrastate freight, if the Master's cost of reproduction were taken as proof of value, might easily be sufficient to defeat rates which were in fact entirely reasonable. It would require $536,329.00 to pay what the Court found to be a "reasonable return" on that excess valuation.

The amount so required is about three times the reduction in intrastate freight revenue *which the company claims was made by the rates in controversy.* This shows how easy it is to defeat rates by erroneous mathematical theories.

The maximum actual investment in the property as shown by the capitalization when the suit was brought, as shown above, was $76,000,000. Apportioned to freight on the basis of gross revenue followed by the Master it would assign to freight, as hereinbefore shown, $59,736,000. Apportioned on our suggested basis of car and engine miles, etc., would assign to freight $66,424,000. Let us now take the greater sum assigned to freight by our suggested basis of apportionment, and reapportion it between interstate and intrastate, by assigning to intrastate 8.07 per cent thereof, and it will give to Minnesota intrastate freight $5,260,416, instead of $16,442,200 so assigned by the Master's method; a difference of over $11,000,000, a "reasonable return" upon which would be according to the findings more

than $770,000. The total reduction in freight revenue effected by the commodity rates on that road, had they been in effect, would have been $83,770.97 according to the Master (p. 270 record, Case No. 599).

The same computation as to the Northern Pacific, from the data hereinbefore set forth, assigning as between passenger and freight, the greater proportion of value to freight, which the use of car mileage as a basis would effect, and taking for Minnesota intrastate freight 12⅓ per cent thereof (using that per cent instead of 12.33 for greater simplicity) would assign to Northern Pacific intrastate freight business $5,956,992.00 instead of $10,867,837, so assigned by the Master. The difference in round numbers would be $4,900,000, which would require net earnings of $340,000 to give upon this excess alone the Court's finding of the necessary and "reasonable return." The total reduction in revenue by the merchandise rates on that road was less than $100,000 and the reduction which would have resulted from the commodity rates (page 270, Master's report, Vol. 1, Case No. 599), was $21,493.67.

This erroneous method of apportioning value—resulting in assigning an excessive amount to intrastate business—and not any insufficiency in the rates resulted in the conclusion that the percentage of return was only the amount found by the Master.

So far as the passenger business is concerned, the error resulting from making the apportionment of value on gross earnings between interstate and

R COPY

intrastate is less striking, because passenger rates when made by the companies or public authority, are the same per passenger mile *for all distances*, while freight rates are much higher per ton mile for *shorter distances*. Neither of the roads charged the full maximum passenger rates allowed by the state law, and neither charged the same average rate, nevertheless the passenger mile relation, and the gross revenue relation are not wide apart between interstate and intrastate passenger business. Of course the state can't be charged with any diminution in passenger revenue resulting from the failure of the companies to charge full maximum rates. They undoubtedly cut the rates by reason of competition, but the state is not to blame for anything it did not compel them to do. On the Northern Pacific, exhibit 80-Elliott (Vol. X, Case No. 599), shows the passenger miles produced and the revenues collected in interstate and intrastate business respectively in Minnesota in the fiscal year 1908, to be as follows:

	Miles.	Revenue.
Interstate	100,930,180	$1,940,718.17
Intrastate	52,317,140	1,015,150.34

At two cents per mile the intrastate revenue would have been $31,192 greater.

The relation of the intrastate to the total passenger miles would be but very slightly different from the relation of the revenue actually collected on intrastate business to the total revenue. On

either relation the percentages would be about 34 per cent intra, to 66 interstate.

On the Great Northern, the interstate passenger miles and revenues are shown by Exhibit 53-Ward (Vol. 6, No. 600), as follows:

	Passenger Miles.	Revenue.
Interstate	92,341,852	$1,890,105.43
Intrastate	92,053,657	1,750,522.02

If two cents had been charged for each passenger mile, as allowed by the state law, the intrastate revenue would be increased $90,551. This addition to the intrastate revenue would make the passenger mile relation, and the revenue relation almost identical, and for the purpose of this computation in this case, it will be nearly enough exact to divide the passenger value between interstate and intrastate equally. The Master used the gross revenue *actually collected*, regardless of the fact that the state law allowed the collection of two cents per passenger mile, which process not only diminished the collectible revenue, but used an artificial indirect basis instead of the logical direct one.

In the Northern Pacific case, the portion of the Master's "cost of reproduction" assigned to passenger business, on the gross earnings basis was $23,758,975; on the car mileage basis the passenger proportion would be as shown above, $12,267,817.

The actual investment in that road as found by the Master, apportioned on gross earnings would charge to passenger, $17,271,513; apportioned on

the car mileage basis, would assign to passenger $8,917,718.

34 per cent of the Master's gross "value" is	$8,078,051
34 per cent of the Master's valuation assigned to passenger on our method is	4,171,457
34 per cent of passenger share of actual cost, Master's apportionment (gross earnings),	5,872,314
34 per cent of passenger share of actual cost, our apportionment,	3,032,022

Between the fair apportionment of the actual investment, and the *value* assigned to intrastate passenger by the Master, there is a difference of over $5,000,000, to which excess the Master assigned as a "reasonable return" over $350,000 of the passenger earnings, *nearly one-third of the entire intrastate passenger revenue for the state.*

In the Great Northern case, the total share of the "cost of reproduction" assigned to passenger on the gross earnings basis was $29,623,012

Passenger share of same sum, on our basis, 17,440,586

Dividing value evenly on this road for convenience, the relation being approximately 50 per cent, gives—

Intrastate proportion on Master's basis,	$14,811,501
Intrastate proportion, our basis,	9,720,293
Difference,	$6,091,208

Passenger proportion of *actual investment*, divided on gross earnings basis, between passenger and freight,	$16,264,000
Passenger proportion, on our basis	9,576,000
Intrastate proportions of the above, divided 50 per cent, Master,	$8,132,000
Our basis,	4,788,000

The difference between the value of the property employed in the intrastate passenger business, resulting from apportioning the actual investment on a reasonable basis, and apportioning the Master's cost of reproduction on the gross earnings basis, is in round numbers $10,000,000, upon which excess the Master applied $700,000 (38 per cent) of the intrastate passenger revenue as a "reasonable return."

COPY

OPERATING EXPENSES, AND THEIR APPORTIONMENT.

After apportioning the value of the property, so as to get at the value of that employed in intrastate business, it is necessary to apportion the operating expenses in a similar manner, in order to get at the cost of the intrastate business. The amount of the intrastate revenue appears with substantial accuracy from the company's records. The accounts being kept by operating divisions, revenue derived from intrastate business is practically allocated at the time of the computation of the charge and the way-billing of a shipment. Interstate revenue on traffic carried partly in the state is apportioned by the companies on the basis of a mileage pro rate for the entire haul; and in this way most of the revenue derived from intrastate business, and also that derived from interstate business done within the state, is shown in these cases, in both the freight and passenger business. There was no substantial dispute on that question in the Court below, and no error is assigned on the question in either of the cases on these appeals, except to the refusal of the Master to include what have been designated "outside earnings," such as those from express business.

There was no showing made on behalf of the complainants as to the necessity for, or reasonableness of any of the expenditures made on account of "operating expenses." The only proof offered on that subject was the testimony that the stated sums

were paid out in meeting the expenses of carrying on the business.

We have quoted testimony showing that many betterments are habitually paid for out of earnings instead of from capital; and we find in the reports of the companies made to the state, (the reports for the years 1907, 1908 and 1909, being printed in Vol. 1 of the record in each case) ample corroboration of that testimony. Taking the Great Northern for example. During the year 1907 and for many years prior thereto the lines of the St. P. M. & M. were operated by the Great Northern under a 999-year lease. This lease has since been abrogated and the lines have been completely taken over by the Great Northern. While the lease existed the companies made separate reports, but all were embodied in the general report of the Great Northern. They appear in that form in the record. In the report of the St. P. M. & M. Ry. for 1907, in answer to the question as to whether permanent improvements or betterments were paid from earnings, appears this notation at page 29 of the report:

> "This company's property is leased to the Great Northern Ry. Co. The cost of any improvements made to the property of this company and charged to operating expenses would appear in the returns of that company."

Turning then, to the report of the proprietor company, immediately following in the record the one above referred to, we find on page 29 of its report, headed "Cost of road equipment, and permanent improvements," the following explanatory foot note:

"The cost of a great many items of permanent improvements and betterments is charged to *operating expenses*, but no attempt is made to separate in our accounts the cost of such items from the cost of ordinary maintenance and renewals."

The items on the page show that during that fiscal year there had been expended on the system for equipment construction, etc., the sum of $4,036,434.76, all of which was paid out of the fund set aside on that road out of earnings, and carried under the head "fund for permanent improvements and renewals." It further appears from the last summary on the page that the company had expended on the lines of the Saint Paul, Minneapolis & Manitoba company, during the period that it had operated it under lease for permanent improvements and renewals, all of which had been paid for from earnings, the sum of $15,648,150.81. The lines of the "Manitoba" company were altogether in Minnesota, North Dakota and Montana.

After the Great Northern had taken over the Manitoba system, in 1907, we find in its report to the state of Minnesota for the year 1908 which is published in volume 1 of the record, and appears as the loose sheets, printed last in the volume, this information, designated "note 1" on consecutive page 118 of said report:

"The entire amount expended during the year for 'additions and betterments,' $4,431,387.75, has been charged to 'Cost of Road.'

Of this amount there has been paid from sums that had been set aside from the income of previous years, and credited to 'Fund for Permanent Improvements and Renewals,' $2,-

> 174,361.66, and the same amount has been credited to the account in the balance sheet (page 85) 'Cost of Additions and Improvements made to Property of the Great Northern Ry. Co., and paid for from fund for 'Permanent Improvements and Renewals.'"

And this additional information on the same page as "Note 2":

> "The amount shown on column headed 'Total Cost to June 30, 1907,' are the sums that had been expended during previous years upon property which has since that date become the property of the Great Northern Ry. Co., viz: 'Amount expended for Additions and Improvements to property then leased from St. P. M. & M. Ry. Co., and which forms part of the amount of $15,648.150.81 shown on Balance Sheet—page 83—in the June 30, 1907, column, against the account 'Cost of A. & I., etc.'"

The same general plan of making permanent improvements and renewals from the revenue, derived from operation, obtains on all of the roads, so that the operating expenses on all are excessive, to the extent that earnings are so misapplied. It was incumbent on the complainants in these cases to show the court just what was done with the several items taken from earnings on account of operation, and that each was a necessary expenditure for that purpose. Such an explanation would have revealed the exact sums used as above shown in making additions and permanent improvements, all of which were of course "capitalized" in the estimate of the cost of *reproducing* the property.

The practice of making inmprovements from earnings and charging them to the operating ex-

COPY

penses of the year in which they are made, for the purpose of discrediting rates was expressly condemned by this court in Ill. C. Ry. Co. v. I. C. C., 206 U. S. 441.

As stated before, the Great Northern and Northern Pacific cases were tried as of the year, 1908, that being the year selected by the complainants. The amount of the operating expenses is one of the most vital questions as to the reasonableness of rates, and we find a most extraordinary showing on this subject, especially in the Great Northern case. The operating expenses in Minnesota on that road in 1908 (Exhibit 47, Martin, Vol. 6, case No. 600) and allowed by the Master, were $11,811,414.35. The operating expenses of that company for Minnesota, on the same system for the year 1907 (report of G. N. for that year in Vol. 1 of record, original pages 43-45) were only $11,119,508.98; and in 1909, *the year after the case was tried,* the Minnesota operating expenses, as appears from page 65-2 of the report for that year in the record, were but $10,699,192.25.

In the year selected by the company in which to test the rates the operating expenses reported by it for the state, were $691,906 greater than for the year before, and $1,112,224.10 greater than they were for the year afterwards, or $902,065 greater than the average operating expenses of the year before and the year afterwards.

The company assumes the exclusive right to say what operating expenses shall be; the foregoing *strange discrepancies are wholly unexplained,* and

the amount of the excess assigned to operating expenses for 1908, would be enough to overthrow rates which might otherwise, in and of themselves, be entirely reasonable.

The operating expenses for the three years, reported by the Northern Pacific for Minnesota were:
1907, $7,678,030.95. (Page 45 report, that year, in record.)
1908, $7,655,350.20 (Found by the Master.)
1909, $7,221,899.87 (Report to state, that year, in record).

The diminution in operating expenses for the year following the trial on the Northern Pacific was over $330,000.00, and we shall show hereafter that on both roads there was a very considerable increase in *net state revenue* in that year, so that the net return on the property in 1909 in Minnesota was very much larger than in 1908.

VI.

THE COURT IMPROPERLY APPORTIONED BETWEEN PASSENGER AND FREIGHT BUSINESS THE COST OF THE SERVICE.

A large part of the operating expenses of a railroad are incurred distinctively in either the freight business or the passenger business, and under the rules for apportioning common items generally followed, the expenses incurred exclusively in the passenger business should be charged to passenger, and the expense incurred exclusively in the freight business should be charged to freight. In the ascertainment of the costs, in the two branches of the business, the companies have adopted the practice of allocating expenses to either passenger or freight wherever possible, and in this way about 60 per cent of all the operating expenses can be and are, directly allocated. The remaining 40 per cent of the operating expenses are common and must be apportioned. It is manifest that the allocation of the distinct expenses, takes care of such items as repairs of cars, and wages of men employed exclusively in the freight or passenger business. In other words practically all of the items constituting the cost of carrying on the transportation are allocable, and the items left to be apportioned on some fair basis are most of the expenses of maintaining way and structures, general expenses and part of the traffic expenses. When it comes to dividing between the freight and passenger business, the operating expenses which are actually

common to both, as we said before, could well be divided on the same basis as that upon which the value of the property used in common is divided. No reason can be given why a different basis should be used, and it is therefore surprising to find that the Master adopted a basis for this division which gives entirely different results from a division *on the gross earnings basis.* We heretofore called attention to the fact that in dividing the values the Master treated the property as if it were all used in common between passenger and freight, but in dividing the operating expenses, he adopted the company's plan of making allocations and also followed the *method* recommended by complainants for making the division of the part of the expenses not allocable.

Exhibit 47-Martin, Vol. 6, Case No. 600, and the testimony of Mr. Martin, assistant controller of the road, commencing near the bottom of page 978, of Vol. 3 of the record in that case, shows the method employed by the two principal companies, for making this apportionment. Its controlling basis is *the relative revenue train miles,* or the relative revenue engine miles, in the freight and passenger business respectively.

There is no substantial difference between revenue *train miles* and revenue *engine miles* as used by the company. As there is always one engine on a train, there is necessarily as many revenue engine miles as revenue train miles in each branch, and the only reason why the two mileages are not identical is that the engine mileage made by locomotives

includes helpers, double-headers and engines running light. Mr. Martin says at page 986, of his testimony last above referred to:

> "Now engine mileage would be the same as train mileage as long as there was but one engine on a train, and as long as the engine was pulling the train, but we sometimes have two engines on a train, and we sometimes have engines running light without any trains, and we have helping engines, so that the revenue train mileage and the revenue engine mileage will not be the same."

To show the exact difference between revenue train and revenue engine mileage in this state on the Great Northern, we quote from the traffic and mileage statistics for 1908 of that road, hereinbefore given, as follows:

Revenue freight *train* miles....	3,218,531
Revenue freight *engine* miles...	3,323,017
Revenue passenger *train* miles.	2,900,819
Revenue passenger *engine* miles.	2,958,576

Any objection therefore to making this apportionment on the *revenue train miles*, would be equally valid when urged against making it on the revenue engine miles. The revenue switching locomotive miles on the Great Northern were 1,396,736. and on the Northern Pacific 1,434,365.

It appears from the testimony of Mr. Hillman that the revenue switching is at least 95 per cent a freight service, and should be so assigned, in order to fairly show the total freight revenue engine miles and the total passenger revenue engine miles, respectively. Mr. Martin says at page 984, Vol. 3, case No. 600, that practically the entire

group of items under the head of maintenance of way and structures cannot be allocated, but must be apportioned, and that they are apportioned by the companies "on the relative revenue engine mileage."

He says at page 986, that in "revenue engine mileage" he does not include "revenue switching engine miles" at all, on any basis. If the revenue switching engine mileage had been included in the proportion of 95 per cent to freight and five per cent to passenger, it would have tended to save the basis from the charge of such manifest unfairness.

As it was used, it was in all essential particulars an apportionment on the basis of the revenue *train* miles. We have heretofore called attention to the fact that an average passenger train on the Great Northern road, as shown by their own reports, in the record, was 5 cars and an engine, while the average freight train was 38 cars and an engine. This method therefore apportions to passenger, as much of the common expense for every mile made by a train of five cars, as is apportioned to freight for every mile made by a train of 38 cars. The same identical method was employed on the Northern Pacific, and the Master upheld the apportionment as to both roads.

The Master says at page 209, Vol. 1, case No. 600, of this division:

> "The method is the same in both cases, and is the one now, and which for many years past has been in general use upon all the leading railroads of the country when any attempt at such division is made, constituting in mileage

at least, about one-third of all the lines of railway in the United States."

One would think from this statement that the method was an elaborate painstaking method of accounting. As a matter of fact it is not a method of accounting at all, on any railroad. The mileages of cars, trains and engines have to be kept and reported for public information by every company, and having those mileages, any accountant could sit down and make this apportionment for use in a rate case in a very few minutes. Instead of being an accounting method it is a mere *computation*, and on its face is clearly unreasonable.

The two principal items of operating expense in the Great Northern case, apportioned on this basis are:

Maintenance of way and structures. (Ex. 47-Martin, Vol. 6, No. 600.)	$3,234,692.31
General expenses	149,607.22
Total, two grand divisions.....	$3,284,299.53

The Master, following Martin's method, apportioned those two items on that road between passenger and freight as follows:

	Maintenance of way, etc.	General expenses.
Passenger	$1,328,835.87	$101,347.24
Freight	1,905,856.44	148,259.98

He thus assigned to passenger business 43 *per cent of the whole*, and to freight only 57 per cent. If the Master had used the gross earnings basis upon which he apportioned value, there would have

POOR C

been assigned to passenger *but* 21.4 *per cent,* and to freight 78.6, while on a wheelage basis there would have been assigned to passenger, but 12.6 per cent.

But the gross earnings basis, which was so manifestly unfair to passenger business as a measure of the relative use made of the property, is far exceeded in unfairness by the relative "revenue train miles" or the relative "revenue engine miles" switching engine mileage excluded.

If all allocations were disregarded, as they were in apportioning value, and operating expenses were divided between passenger and freight on the gross earnings basis, as value was, it would assign to the passenger business on the Great Northern in 1908, 21.4 of *all cost of operation,* or $2,527,642. After 60 per cent of the expenses were allocated, and only 40 per cent divided, the Master's apportonment assigned to passenger 31 per cent of *all expenses,* or $3,670,058. If the "Transportation expenses," "Maintenance of equipment," and "Traffic expenses," which were not all, but were in large part allocated, be left as they are given in Exhibit 47-Martin, and the unallocable expense of Maintaining way and structures and General expenses, be apportioned on wheelage basis, assigning 12.6 per cent thereof to passenger, it would make total passenger share of operating expenses, $2,653,697.37. Either of these methods would transfer to the credit side of net passenger revenue more than $1,000,000, in round numbers, and make the net passenger revenue, applicable to interest on bonds and dividends on stock, $1,680,793.60, instead of

$680,793.60 as shown on the table appearing opposite page 226, of volume 1 of the Great Northern record, No. 600.

Exhibit 53-Ward, Vol. 6, Great Northern record shows that the gross passenger revenue for the entire system for 1908 was $11,192,461.25, and the total operating expenses for that year were $36,158,055.63. If the total operating expenses on the system were apportioned between passenger and freight on the same basis as operating expenses in Minnesota were apportioned by the Master, it would assign 31 per cent to the passenger business of the system or $10,108,997.23, leaving as the total net profit on the passenger business of the system including Minnesota, only $1,083,464. Subtracting Minnesota net above, it would leave the remainder of the system net passenger earnings of only $402,671. It would not require much more such figuring to put the road in the hands of a receiver, notwithstanding its regular seven per cent dividends, and enormous annual surplus.

The road has made its own interstate passenger rates, and most of its intrastate rates. If 21.4 per cent of its entire property were deemed to be engaged in the passenger business, as the Master finds is the case in Minnesota, that per cent of his "cost of reproduction" of the system, amounting in round numbers to $97,000,000, would get but a poor return out of the passenger business, if it were all squeezed between the upper and nether millstones of excess value, and excess cost, as it has been at the hands of the Master in Minnesota.

VII.

THE COURT ERRONEOUSLY ASSIGNED AN EXCESSIVE PROPORTION OF TOTAL OPERATING EXPENSES TO INTRASTATE BUSINESS, BOTH FREIGHT AND PASSENGER.

As we have heretofore pointed out, it is claimed in the complaint and the claim was upheld by the trial court,—that interstate and intrastate business in Minnesota are so homogeneous, that rates that are fair and resonable for one class are, under similar circumstances, equally fair and reasonable for the other. For this reason the companies insist on the right to use the same tariff for the two classes.

When it comes to apportioning operating expenses between interstate and intrastate business, however, the companies claim that the two classes are so heterogeneous, that the cost per unit of handling intrastate business is many times the cost of handling the interstate. The claims seem irreconcilable, but the court below upheld both.

It is perfectly manifest that business carried for short distances on local trains is more expensive to handle than through business, not because of the class it belongs to, but solely because of the different train service it receives.

WHAT IS THROUGH, AND WHAT LOCAL BUSINESS?

Every extensive railroad is divided into, and operated by what are known as operating divisions. From the evidence in these cases the Master finds (Vol. 1, record No. 599, p. 256) that such operating divisions, constituting an engine run, are from 110 to 150 miles in length.

As all the business is conducted, and men employed with reference to these divisions, the accounts of the companies are also kept with reference to the operating divisions (Hillman, Vol. VII, No. 599, p. 3279; Martin, Vol. 3, No. 600, p. 955). In thus subdividing the roads, *branches* are made operating and accounting divisions by themselves.

Over these several divisions on the main line of each road, according to universal practice, two classes of freight trains are run, known as *through* trains, and *local* trains. All trains start from divisional points, and the *through trains* are made up of the cars carrying either full or partial loads destined to the end of the division or points beyond, and run from one end of the division to the other without stop. The *local trains* are made up of the cars carrying business destined for points intermediate to the terminii of the division, and such trains stop at all stations to deliver and pick up business. The local train in addition to the carloads to be delivered at such intermediate stations carries the peddling car for delivering and picking up small business.

The local trains pick up all traffic originating at the intermediate stations, whether carload or less, and if the same is destined to a point beyond the end of the next division it is hauled to the division terminus and there transferred to a through train for forwarding. (Ward, Vol. 3, No. 600, p. 1111; Elliott, Vol. 4, p. 1292, and Vol. 7, p. 3187, No. 599.)

Through trains may run over a single division, or over two or more divisions according to the requirements of the business, or they may run between the main terminii of the road. But where such trains run over more than one division they undergo constant changes at divisional points, by dropping out cars destined either for such divisional points or for intermediate points on the next division, and taking on cars originating or assembled by the local trains at such divisional points, and to be hauled "through" over one or more succeeding divisions.

At page 3186, Vol. 7, No. 599, Mr. Elliott assented to this classification of the business, as the following question and answer will show:

> "Q. Now in order to put the matter beyond dispute so that we can agree on terms if possible, do I understand you to say that, in ascertaining the cost of freight between through and local freight, freight passing over an entire division should be, as to that division, classed as through freight, and freight passing over only a portion of one division should be classed as local freight?
>
> A. Yes, sir; I agree to that."

He also said that *local train service* was more expensive than *through train service;* that *all trains* on the branches were local and represented the *most expensive* local train service.

This Court recognized these two classes of trains in the Tompkins case, 176 U. S. supra.

The Master found (Vol. 1, p. 256, No. 599) that this difference in the train service is the chief factor in causing differences in cost of the two classes of business. He said on that subject:

> "Doubtless the most marked difference in transportation cost depends upon whether the freight handled is *through* or *local,* with respect to the several operating divisions of the line. * * * There is, of course, *some intrastate* traffic which moves on *through* trains, but the greater part thereof is local freight. There is also a *considerable amount of interstate traffic* which moves on *local* trains, but by far the greater part thereof is through freight, as is shown by the long average haul."

The term "local" has been used in some of the adjudged cases to designate *intrastate business,* and while the term is correct enough when speaking generally of the two classes of business, it must be kept in mind that the word *local* has a technical meaning as applied to trains, and that meaning necessarily also extends to the business carried on such trains, which meaning is not at all synonymous with *intrastate.*

Having found that the chief difference in cost depends on whether the haul is made on through or local trains, only the first step has been taken in determining relative cost. If all interstate busi-

ness was carried on through trains, and all intrastate on local trains, the problem would be comparatively simple, because it would not be a difficult matter to keep account of all through train service and all local train service separately. But the problem is complicated by the fact that *the trains of each class carry more interstate than intrastate business.*

On the Great Northern road interstate business is about 92 per cent of the whole business in the state, and on the Northern Pacific it is about 88 per cent of the whole. A vast amount of interstate business reaching the state from outside commercial centers, is carried from the Minnesota Transfer to its destination on local trains. In consequence very much the greater number of tons and ton miles of freight carried on the local trains is *interstate business.* (Table 5, Ex. 3-M, Hillman, Vol. 9, N. P. Record; Table 5 Ex. G-Hillman, Vol. 5 G. N. Record, 600.)

Although the intrastate business carried on local trains might not exceed 35 per cent of the business so carried, the proportion of the *intrastate as a class,* so carried, would be greater than the *proportion* of the interstate, because of the smallness of the volume of intrastate as compared with interstate.

But the facts and figures both in this and other states show that by far the greater part of the extra cost of local train service is properly chargeable to *interstate business,* while a large part of the intrastate business is carried on through trains.

It is therefore evident that in order to apportion the extra cost of local train service between the classes accounts must be kept of the extra cost of the trains, and of the relative quantities of interstate and intrastate business carried on each.

Relative Cost.

The companies failed to present to the Master on this branch of the case any evidence in the form of accounts, showing the actual cost of the operation of *through* trains or *local* trains on their respective roads, or any record of the actual quantities of *interstate* or *intrastate* business carried in the state on either of such classes of trains. They claimed they did not keep accounts so as to show this information.

But it is clear that such accounts can be kept, and if kept they would reveal clearly the *bases* upon which the Master says the differences in cost rest.

As was stated by the Interstate Commerce Commission in Western Rate Advance Cases, supra,

> "It would be remarkable indeed if, in this time when all great business enterprises make analyses of costs, our railroads should keep no such accounts."

Of course it is as plain as any self-evident thing can be that the haulage cost of a carload of groceries carried on the Great Northern road from Saint Paul to East Grand Forks in Minnesota, can be no more than a carload of the same groceries on the same train from Saint

Paul to Grand Forks one mile farther in North Dakota, the latter being an interstate shipment. On the same train there may have been a *half carload* of similar groceries shipped from Chicago, received by the road at Minnesota Transfer and hauled as a part of an interstate shipment to Saint Cloud, an intermediate station between Saint Paul and Grand Forks, at a much higher cost per ton mile than the intrastate carload to East Grand Forks.

Complainants' exhibit 1-Darling (Suit No. 599) shows that a main line of the Northern Pacific road extends from Duluth and Superior, westerly to Staples a division point, thence to Dillworth, Minnesota, the next divisional point.

A train load of intrastate merchandise carried on a *through train* on the Northern Pacific road from Duluth to Dillworth—over two complete operating divisions, could not cost any more to handle than a similar train load of merchandise carried on a *through train* from Superior to Dillworth, over the same divisions, the latter being an interstate haul.

Differences in the cost of handling cannot arise from the mere fact of the business being interstate or intrastate; it arises solely from the train cost, and as stated before interstate business predominates on both kinds of trains. These facts show that there is no intelligent way in which the extra cost of local train service can be apportioned between the two classes of business, unless the carriers will keep accounts of the actual cost of all local train service and all through train service,

R COPY

and also accurate accounts showing the actual quantities of interstate and intrastate business carried on each kind of train within the state.

With that information it would be a simple matter to correctly apportion the local train expense between the classes, and get at the relative cost of handling each class.

The companies tried to excuse their failure to keep such accounts by the claim that the accounts if kept would not show the relative costs *with mathematical exactness.* But they claimed the right, and were permitted by the Master and trial court, to give evidence of the relative costs of handling the *two classes* of business, in the shape of *self serving opinions* as to such relative costs, claiming that by long experience and observation they had become qualified to form and express an *opinion* on the subject. The state cannot keep accounts on this subject, and if in the absence of accounts which should have been kept by the carriers, the court accepts the self serving opinions of railroad officials, intelligent regulation will be impossible.

Before the rate making power of the state can know whether a proposed rate is reasonable, it must know the approximate cost of handling, as well as the volume of the business. The total cost in a state is ascertainable from the books of the companies, although much of the information from which they make up their books on this subject comes from apportionments and approximations made according to the methods of cost accounting. But when the question of the relative cost of inter-

state and intrastate freight business is reached no attempt is made to keep any accounts with reference to the subject.

The companies disingenuously declare that although the causes of the differences in cost are known, and *there are* differences in fact, Cost Accounting is unable to answer the two simple basic questions:

1. What is the cost of through train freight service, and what is the cost of local train service, classing all branch line freight trains with the local trains on the main line?

2. What proportion of the business carried on local trains for a given test period, is intrastate and what proportion interstate?

But when offering so called expert opinions on this subject so clearly a proper subject for bookkeeping, they not only reject the science of cost accounting, but also discard the bases on which such accounts should be kept, by refusing to take into account in forming their opinions the two questions above outlined.

At page 3128, Vol. 7, N. P. record, Mr. Elliott the president of that road was asked to state the elements of extra cost of doing "the state *or short haul business,* as compared with the *longer haul* business of your line". His answer is a long one and was read from manuscript. He frequently uses the term *"local* intrastate business," which must have been intented to describe that part of the intrastate business carried on local trains. At page 3144 of the record after enumerating the differences

between business carried on local trains and that carried on through trains he sums up his conclusion as follows:

> "All lead me to the conclusion that the so called *local short haul intrastate business* costs anywhere from three to six or seven times as much as the so called *long haul through interstate business.*"

At page 3172 same volume Mr. Elliott on cross examination testified as follows:

> "Q. When you were comparing the cost of interstate business with state business you confined your testimony to that character of interstate business described by you as long haul interstate business which is carried at the minimum of expense?
>
> A. Yes, sir.
>
> Q. And when you spoke of the state business you referred exclusively to the short haul local intrastate business, being the character of freight that is carried at the very highest expense?
>
> A. Yes, sir.
>
> * * * * *

Page 3173.

> Q. Were you not at that time comparing the most expensive class of state business, with the least expensive class of interstate business?
>
> A. That is correct.
>
> Q. You just said you were not, that you were depending upon your general experience?
>
> A. You asked me how I came to my conclusions, I told you. When you talked about comparisons, I was comparing. ***But the short haul interstate business is just as expensive as the short haul state business.***
>
> Q. You have made no statement then in your testimony as to how much more the state business *as a whole* costs per ton, than the interstate business *as a whole.*

A. *I have not made such a statement, no, sir.* I said this— * * *

* * * * *

Page 3172.

Q. Do you know what portion of tonnage carried by your road upon *local trains* in the state of Minnesota is *interstate freight?*

A. No, sir.

Q. Nor what proportion of the tonnage carried on those same trains is state freight?

A. No, sir.

Q. Do you know what proportion of the tonnage carried on through trains—that is trains extending over at least one division of the road—is state freight?

A. No, sir.

Q. Nor what proportion is interstate freight?

A. No, sir."

At page 3177, same volume, he further testified on the same subject as follows:

"Q. That matter could be ascertained, Mr. Elliott, could it not?

A. Not as to the past.

Q. Has it not been ascertained?

A. It may have for some one or two months *where particular accounts were kept.*"

In the Great Northern case, Mr. Frank E. Ward, formerly general manager of that road and at the time he testified general manager of the Burlington line East of the Missouri river, called to give his *opinion* on the same subject, testified generally as to the diffrences in cost between the *local* and *through* business, intimating though not stating, that all intrastate business was carried on local trains. He stated however that he did not know the relative tonnages of the two classes carried on

either kind of train. On cross-examination (p. 1108, Vol. 3, case No. 600), he testified as follows:

"Q. Which in your opinion preponderates, the interstate business on local trains, or the intrastate business?

A. In my opinion the intrastate.

Q. But you have no definite information on the subject?

A. I have not, no, sir.

Q. It could have been ascertained, couldn't it?

A. I think so possibly."

Mr. Doddridge, called by complainants for the same purpose, said (Vol. III, p. 1161, Great Northern Record):

"Q. You are not able to tell how much interstate business is carried on local trains in this state?

A. No, sir.

Q. Nor how much state business is carried on through trains?

A. I can't state that with exactness, in Minnesota.

Q. You could give that information as to the state of Missouri, if it were pertinent, could you?

A. Well, I don't know whether I could from memory. *I can give it to you in the state of Arkansas.*

Q. I don't care what it is, I only want to know if you could furnish it from memory or from records.

A. I can furnish it in Arkansas.

Q. From accurate records?

A. Yes, sir; that is, I can furnish it for the time the matter was looked into; it changes, you know, it doesn't run regular.

Q. I know, but it is an ascertainable fact?

A. Yes, sir; the amount of tonnage, state and interstate, carried upon local trains can be ascertained from records.

POOR

Q. And the amount of the respective tonnage of state and interstate business carried on through trains can also be ascertained?

A. Yes, sir; that is a matter of figures.

The Master: Separately?

Witness: Yes; it can be obtained separately; that is, for a given period. I will say, however, that it is quite a task to compile it."

Mr. William G. Johnson, assistant Comptroller of the Northern Pacific, when testifying on the subject of the relative costs of local and through business candidly admitted that he called all interstate business "through," and all intrastate "local" with reference to the train service it received, and the resulting cost. (P. 4119, Vol. 8, N. P. Record.)

At page 1313, Vol. 4, record No. 599, Mr. Elliott further testified as follows:

"Q. Are you able to state the relative cost of transacting state and interstate business?

A. I am not, no, sir.

Q. The mere fact of a shipment falling within either one of those classes would not affect its cost, would it?

A. No, I think not.

Q. The cost would depend upon the character of the shipment and the actual services performed in transporting it?

A. Yes.

Q. Now, it is also true is it not, that the character of interstate business in general is the same as the character of what we call state business?

A. Well, in a broad way I should say it was. We have the same miscellaneous movement passing over state lines that we do wholly within state lines.

Q. That is some of the state business can be transported at the lowest cost, and some of

the interstate business is transported at the highest cost?

A. That is right."

At page 1318, same volume, Mr. Elliott stated that the cost of through train service *is practically duplicated on each operating division.* He used these words:

> "A. Well, given all the conditions that you speak of, exactly the same as to volume of business, the light engine mileage, grades, weather, everything, why I should say theoretically, *the cost for* 150 *miles of one engine run would be the same as the cost of* 150 *miles of another engine run.* You would have to have exactly the same conditions."

Long and Short Haul Business.

Much of the railroad testimony as to the relative cost of interstate and intrastate business is based upon the relative length of the average haul. "Short haul" business is generally declared to be more expensive, and "long haul" business to be less expensive.

Ordinarily in such testimony there is no definition of how far traffic must be carried to be "long haul" or "short haul," and under such circumstances while that is a railroad secret, there would be some excuse for *opinion* testimony on the subject.

The finding of the Master that the difference is directly traceable to the differences in the cost of through and local trains, and the foregoing statement of Mr. Elliott that the cost of a through train can be determined by multiplying the cost on the

first division of the road by the number of divisions over which it passes, strips the phrases "long haul" and "short haul" of the mystery that has heretofore surrounded them. It makes those terms mean concretely *through business*, being business carried on through trains, and *local business* being business carried on local trains; the one *as a class* carried at the greatest economy, and the other carried at the greatest expense.

In describing the manner in which business is transferred from one class of train to the other, either in being assembled, or delivered to its specific destination, it appears that most business carried for considerable distances is during part of its haul *local business*, and for a part of its haul *through business*.

The "average haul" of business of either class has in itself no probatory significance in determining the relative cost.

To illustrate. Let us assume the existence of a railroad with its main terminus in Minnesota, 100 miles east of the western boundary, and extending thence westwardly 500 miles, into North Dakota.

Let us further assume the formation on the road of five operating divisions of 100 miles each, one entirely in Minnesota, the other four in North Dakota, and the shipment during a given period of 500 tons of freight from the main terminus destined, respectively, 100 tons to the end of *each division*, all carried on through trains.

This would produce 10,000 ton miles of intrastate freight, with an average haul of 100 miles, and

COPY

140,000 ton miles of interstate freight with an average haul of 350 miles. The average haul of the interstate business would be three and one half times that of the intrastate but, obviously, and, according to Mr. Elliotts testimony,—as all the business was carried on the same kind of trains being through business as to each division—the ton mile cost would be identical.

When the business is thus reduced to first principles, and the business that is more expensive as a class, is shown to be the business carried on local trains, if accurate information is furnished as to the relative proportions of the constitutional classes so carried any accountant can compute the relative costs. It will be found that because a greater *proportion* of the intrastate business is carried on local trains, the cost of handling that business is slightly in excess of the cost of handling interstate business. We want to again call attention however to the difference between the greater *proportion* of the intrastate business, and the greater volume in tons and ton miles of actual business carried on the local trains and that in the latter respect, the interstate business predominates.

INTRASTATE BUSINESS CARRIED ON THROUGH TRAINS.

There is another consideration having an important bearing on the question of the relative cost between the classes, that is the large quantity of Minnesota intrastate business which is carried on through trains.

STATISTICS.

The year book for 1911, McMillan & Company, stating Minnesota products for the year 1909, gives grain alone amounting to 279,280,000 bushels, and when the magnitude of the milling industry of the state is considered, it is easily understood what a large portion of this grain constitutes intrastate through shipments upon some divisions of each railway between the point where the shipment originates and the mill to which it is destined. The same is true with reference to live stock delivered at the stockyards, located at South St. Paul and the logs received at and lumber shipped from the lumber mills located in different parts of the state. The record shows the magnitude of the traffic between St. Paul and Minneapolis, considered as one terminal, and Duluth at the head of the lakes. Solid trains of coal and miscellaneous freight being thus carried at a minimum cost. This condition is further shown by Defendants' Exhibits 3-G and 3-H, Staples; Exhibit 3-G showing the number of cars of grain weighed at Minneapolis for a series of years, and Exhibit 3-H giving substantially the same information for Duluth and showing a total of 227,133 cars for the year 1908, or an average of 666 cars of grain per day so arriving at those markets. The cars so received included interstate shipments and while the exhibits do not show what portion of this grain belonged to intrastate traffic, they show the substantial character of the Minnesota grain market. This, with the heavy grain pro-

duction of Minnesota fully establish the heavy character of the intrastate tonnage and that large quantities of it are carried upon through trains at a minimum cost.

The great grain fields of Minnesota are principally in the western part and the grain in reaching either the Minneapolis or Duluth market is in many instances necessarily hauled over two or three divisions.

We give the following from Mr. Elliott's testimony (Vol. 7, p. 3188, N. P. Record):

"Q. Well, now, is the traffic in wheat between Staples and Duluth quite heavy?

A. At times quite heavy.

Q. That nearly all originates west of Staples, does it not?

A. Quite largely. I should say that 'nearly all' is approximately correct.

Q. Now, when that originates along the line between Dilworth and Staples, it is picked up by the local trains and delivered at Staples?

A. Yes, sir.

Q. And when Staples is reached, solid through trains for the transportation of wheat are formed, are they not, and run to Duluth?

A. In the heavy wheat-moving season we make up solid trains that go to Duluth and Superior, both, endeavor to make them as big as we can and load them as heavily as we can.

Q. In estimating the earnings of different trains operated by the Northern Pacific Road, did you ever estimate the earnings of a train loaded with wheat to its maximum capacity from Staples to Duluth?

A. I never did, no, sir.

Q The earnings of a train of that character would be very heavy, would they not?

A. They would be heavy compared with many other trains. That would be a very good train.

Q. Could you name any more profitable character of service per mile?

A. Well, a train of high-class merchandise might pay more; I would have to make a calculation to determine that.

Q. The number of tons of wheat transported in that manner within the state of Minnesota would be quite an important factor in determining the relative cost of the service in Minnesota, would it not?

A. Yes, sir.

Q. You have never ascertained that?

A. As I say, I never have gone through a computation of any given train between Staples and the Head of the Lakes."

See also Mr. Elliott's testimony, already quoted (Vol. 4, p. 1313, N. P. Record), and the following at page 1314:

"Q. As a general proposition, the articles which are carried for long distances and in large quantities, are those which are transported at the lowest proportional cost, are they not?

A. I think that is correct.

Q. In the state of Minnesota is it not true that in the purely internal commerce a considerable portion of it falls within the class which can be transported at a low rate?

A. *There is quite a large proportion.*"

A Final Test.

The foregoing testimony of complainants' witnesses Elliott, Ward and Doddridge is sufficient to show that the information necessary to satisfactorily show cost of each class could have been obtained and presented in these cases; but the final demonstration of that fact occurred in connection

with the testimony of Mr. Hillman, expert accountant for the state.

Mr. Hillman had made a detailed examination of certain records known as "station agents' abstracts," for two typical months, for the purpose of ascertaining the tonnage respectively of through and local trains, and the results obtained by him are contained in Table 5, Exhibit 3-M Hillman (Northern Pacific record); table 5, Ex. G (G. N. record), and table 5, Ex. L (M. & St. L. record). We will follow the Northern Pacific exhibit. He then made an examination of records known as "Conductors' Reports," for the purpose of ascertaining the same information, and the results obtained by him from those reports are contained in Table 6, Exhibit 3-M, Hillman (N. P. Record, Vol. 9).

The station agents' abstracts from which Table 5 was compiled gave the origin and destination of freight shipments, but from them it could not be determined whether in fact the freight was carried upon a through or local train, so that Mr. Hillman concluded he would be justified in classing upon each division as through freight, all freight which necessarily was carried over the entire division; and, as local freight, all which passed over only a portion of the division.

The conductors' reports from which Division A, Table 6, was derived, gave the tonnage of each train at the initial point only, so that while those reports must be accurate as to through trains, they of themselves do not necessarily show the total tonnage of local trains over the entire division.

Because of the inability of the state to show that the freight described in the station agents' abstracts was actually carried upon through or local trains as its character would indicate it should be carried, because the conductors' reports showed only the tonnage of the trains at the initial point, the Master rejected both of these tables, finding that the assumptions underlying them were not sufficiently supported. In this, as in all other positions taken by him, the Master was affirmed by the Court. It will be noted that any lack of information arises from the insufficiency of the companies' records in themselves, and if this were a case between ordinary litigants, the rule that he upon whom the burden rests must sustain it by satisfactory evidence would be sufficient to defeat complainants' cases. But as said by this Court in the Knoxville case, supra, the testimony required to set aside a state law must be much stronger.

However, there is in the record a demonstration that Tables 5 and 6 do show the relative tonnage carried upon through or local trains, or if they contain an error it is one favorable to complainants' interest.

It sufficiently appears from the record that during the giving of Mr. Hillman's testimony Mr. Johnson, assistant comptroller of the Northern Pacific road, was present, and after Tables 5 and 6 had been introduced in evidence and Mr. Hillman subjected to a cross-examination extending over many days, it was apparent to counsel upon both sides of the case that if freight could be segregated

between through and local trains, the most important factor in arriving at cost would be established, and so the cross-examination of Mr. Hillman was especially intense as to the assumptions made by him in arriving at the conclusions stated in Tables 5 and 6.

At this most interesting and important point Mr. Johnson was called to the stand by the defendants and challenged to contradict Mr. Hillman. He testified, (Vol. VIII, p. 4108, Northern Pacific record No. 599:)

"Q. Have you ever made a computation to ascertain the number of tons of freight on the Northern Pacific road which would come under the classification of through freight as given by Mr. Hillman; that is, freight which passed entirely over one division?

A. No, sir, not in this case; I have not.

Q. Not for this case?

A. No, sir.

Q. Or have you ever made a computation as to the number of tons of local freight according to the classification as given by Mr. Hillman?

A. No, sir.

Q. Have you ever made any computation as to the number of local and through tons of freight transported in the state of Minnesota by the Northern Pacific under any classification of through and local freight except interstate and intrastate?

A. Yes, I have made such a calculation.

Q. Are you able to state, from your experience as assistant comptroller of the Northern Pacific road and from any computations which you have made, whether Mr. Hillman's Table 5 correctly states the through and local tonnage, classified as he has given it upon the Northern Pacific, for the year for which that computation is made?

A. No, sir; I cannot say that I am in possession of information from which I could criticise Mr. Hillman's Table 5, which, as I understand it, was built on an 'entitled to' movement, not an actual movement of freight.

Q. Are you able to say how much the actual movements of freight would vary from what you consider an 'entitled to' movement?

A. No, sir; I never have investigated that.

Q. So far as actual movements are concerned, as determined from conductors' train sheets, are you able to say whether or not Mr. Hillman's Division A of Table 6 correctly represents the actual movements of through and local freight, classified as he has classified them?

A. I have made some investigations along those lines and my results do not quite compare with Mr. Hillman's.

Q. Do you find a larger or less amount of freight carried on local trains?

A. I don't remember the figures now, Mr. O'Brien; I haven't them with me.

Q. Is the divergence between you very great?

A. No, I wouldn't say that it was very great."

The investigation referred to by Mr. Johnson was undoubtedly the same as what Mr. Elliott meant when he said (Vol. 6, p. 3177, N. P. Record) the proportion of local trains loaded with interstate freight might have been ascertained "for some one or two months, where particular accounts were kept."

Why, then, were those particular accounts not produced, and in their absence can complainants succeed by proclaiming and relying upon the imperfections and insufficiency of their own records?

The last witness called by complainants in the

Northern Pacific case was the assistant comptroller, Mr. Johnson. His testimony then given appears in Volume VIII, pages 4214 to 4239, inclusive, Northern Pacific record No. 599. He gave the testimony which we have quoted, on July 27th, 1909, and in which he was challenged to contradict Mr. Hillman's segregation of freight (page 4107). His next appearance upon the stand was on September 24, 1909, (page 4214), but he still refrained from presenting to the Master the result of the investigations upon this subject which he admitted he had made, or to state that Mr. Hillman's conclusions were incorrect.

HILLMAN'S TABLES 5 AND 6, EXHIBIT 3-M.

It is proper now to refer particularly to Mr. Hillman's claim as to the freight, state and interstate, carried respectively upon through and local trains.

From the beginning of these cases both sides had agreed that the months of April and October in each year were typical of the year's business and so percentages derived from the totals of those two months were accepted as accurate.

From the original company records as said for those two months Mr. Hillman found the character of the freight on each road dividing it between through and local upon each operating division and then sub-dividing each between intrastate and interstate freight. We have already given the reference to the tables in each case and present here for illustration table 5 of Defendants' Ex. 3-M Hillman (Northern Pacific Record, Vol. 9).

POOR CO

The percentage of each class of freight given by Division A of table 6 is slightly different, but it is immaterial which is used or which case is taken for illustration. Each in itself is a demonstration that this information can be obtained from the records of each company. In spite of the Complainants' efforts to impeach their own records we insist that this is the best evidence and was introduced upon behalf of the state not so much for the purpose of showing cost,—the burden was not upon the state,—but to demonstrate a plain and simple method for showing cost.

OPY

PAGE BOUND VERTICAL IN BOOK

DEFENDANTS' EXHIBIT 3-M, HILLMAN.—Continued.

TABLE NO. 5.

NORTHERN PACIFIC RAILWAY

FREIGHT MOVEMENTS (TONS AND TON MILES) THROUGH TRAINS, LOCAL TRAINS AND ALL TRAINS, CARLOADS, LESS THAN CARLOADS AND TOTAL COMPILED FROM AGENTS' ABSTRACTS, APRIL AND OCTOBER, 1907.

	TONS. All Trains.		TON MILES Through Trains.		Local Trains.		All Trains.	
	Inter.	Intra.	Inter.	Intra.	Inter.	Intra.	Inter.	Intra.
Carloads	1,054,837	286,681	159,050,710	15,507,897	44,954,383	17,663,649	204,005,093	33,171,546
Less than carloads	72,668	44,074	12,547,243	1,530,004	516,550	3,085,624	13,063,793	4,615,628
Total ...	1,127,405	330,755	171,597,953	17,037,901	45,470,933	20,749,273	217,068,886	37,787,174

The percentages of total intra and interstate freight which are respectively through and local and as we insist presumably carried on through and local trains are as follows:

	Through Trains		Local Trains	
	Inter	Intra	Inter	Intra
	%	%	%	%
Nor. Pacific....	90.967	09.033	68.67	31.33
Great Northern	95.631	04.369	69.949	30.051
M. & St. L.....	91.468	08.532	73.618	26.382

We have already shown not only from the direct evidence given, but still more because of the grim silence maintained by those in a position to know the truth, that these tables must be conclusively presumed to be correct. Indeed it seems to us from the entire record that it was *binding in conscience* to accept Mr. Hillman's deductions. We now ask in further corroboration of them to again refer to the record now before this court in the pending appeals in the Missouri case, where it appears that by a series of actual tests very similar percentages were secured.

Master Rejected Hillman's Tables.

The Master refused to take the data on the relative volumes of through and local traffic, deduced by Hillman, the state's accountant, from the company's books, and the further deductions from the same source as to the relative volumes of interstate and intrastate business on through and local trains. Counsel for the carriers, in order to uphold their

BLURRED PAGES

"opinion" testimony as to relative costs disparaged Hillman's testimony even to the extent of claiming that there was not enough information on the subject, in their books, to justify a calculation based thereon, and this the Master in effect decided. In other words, he held that as to an important subject of accounting he would uphold self-serving and evasive opinions of the officers of the railroad companies as against an analysis of their books of account by a disinterested expert accountant; not upon the claim that a single figure used by him was false, but on the ground that the company's records were too imperfect to be reliable. (Vol. 1, p. 257, N. P. Record, No. 599.)

The Master further said:

> "Another matter tending to discredit the Hillman method is the wide-spread in operating per cent between state and interstate business of some of the companies and the low operating per cent as to state business on some lines as compared with that on others and as compared with the operating per cent generally found to exist on all lines of all business done in the country. Operating per cent is the per cent of gross revenue absorbed by cost of operation, and if we may take the statements of counsel in one of the briefs for defendants (and it would seem to be a matter as to which the Court might take judicial notice), such operating expense is about 60 per cent of gross revenue generally throughout the country. By the Hillman method percentages of operating expense to revenue after deducting estimated losses from the prescribed rates in the three cases are found to be as follows:
>
> Intrastate passenger, N. P., 58.89; G. N., 67; M. & St. L., 62.54.

Interstate passenger, N. P., 51.69; G. N., 59.2; M. & St. L., 63.67.

Intrastate freight, N. P., 55.21; G. N., 41.51; M. & St. L., 48.19.

Interstate freight, N. P., 54.47; G. N., 60.58; M. & St. L., 85.03.

In the St. Louis case, in the intrastate business, without deducting for estimated loss, the operating expense would have been only 41.9 per cent of intrastate revenue, and in the Great Northern case such operating expense would have been only 39.9 per cent of intrastate revenue. There seems to be no substantial reason for the difference here found to exist on the Northern Pacific when compared with the Great Northern Line, and the marked and necessarily conceded difference in density of traffic over these lines and that over the Minneapolis & St. Louis line, the former greatly exceeding the latter, would be expected to produce very different results than those shown by this table of comparisons. The wide disparities and unusual results from comparisons are not adequately explained, and they strongly suggest an improper method of division between the two classes of business."

If a result giving a "wide spread" in *operating percentages* for different classes or upon different roads is evidence of an incorrect method, that adopted by the master must have been wrong as the "spread" resulting from his conclusion is greater than that found by Hillman.

No involved computation is necessary to determine this. The Master having in each case found gross revenue intrastate and interstate from both passenger and freight traffic and operating expenses for each separately, there is no difficulty in finding the *operating per cent.*

The result is as follows:

GREAT NORTHERN CASE.

Intra Pass. 97.43%	Intra Freight 72.92%
Inter Pass. 73.47%	Inter Freight 50.62%

Computed from page 153 of Master's Report.)

NORTHERN PACIFIC CASE.

Intra Pass. 72.80%	Intra Freight 87.12%
Inter Pass. 64.40%	Inter Freight 51.99%

(Computed from page 143 of Master's Report.)

In the Minneapolis & St. Louis case the Master determined operating expenses on the "straight revenue basis" (Vol. 1, p. 278, N. P. Record.) That is, he assigned operating expenses in proportion to gross revenue which gives in percentages the following:

MINNEAPOLIS & ST. LOUIS CASE.

Intra Pass. 70.76%	Intra Freight 62.75%
Inter Pass. 70.76%	Inter Freight 62.75%

(Computed from pages 145-146 and 147 of Master's Report.)

Had he found the percentages upon the same assumption as in the other cases we would be able to compare this case with the others.

There is a very simple explanation why the relative expense for interstate business is so much higher upon the Minneapolis & St. Louis than upon the other roads. It is that the railway is almost entirely dependent upon other roads for its interstate

business and is compelled to accept as its proportion of a through charge an exceedingly small amount.

This was fully explained by Mr. Tittemore long before the question of cost accounting came up and his testimony discloses how much less than the amounts prescribed by the state for intrastate business, the Minneapolis & St. Louis Railway was actually receiving for a great part of its interstate business.

Tittemore, pp. 190-1-2, also p. 177, Vol. 2 (M. & St. L. Record No. 601).

Cost of Through and Local Trains.

The different items of operating expenses going to make up total cost have been under the direction of the Interstate Commerce Commission segregated into five groups known as Transportation Expenses, Maintenance of Equipment, Maintenance of Way and Structures, Traffic Expenses and General Expenses. The character of the items going to make up each group can be found by reference to the exhibits introduced by both sides in these cases. At the time of the making of the record by the Northern Pacific Company reproduced in Exhibit 3-M Hillman, Volume 9, N. P. Record 599, there were but four groups. This, however, is immaterial, as we shall only find it necessary to refer especially to one group, "Transportation Expenses" as it is designated in Complainants' Exhibit 47-Martin (Vol. 6, Great Northern Record No. 600)

or "Conducting transportation," as it is designated upon the Northern Pacific records, Exhibit 3-M Hillman, Table 1, Northern Pacific record. This group contains all the items described by Mr. Johnson, Assistant Comptroller of the Northern Pacific road, as showing the cost of physically handling and hauling freight. So that in making a division of the cost of operation between through and local freight trains, it is only necessary to ascertain what portion of the expense going to make up the total of the group designated conducting transportation belongs to each class. If we now turn to Table 1, Exhibit 3-M Hillman, which we prefer to use for illustration because it is an exact reproduction of the Northern Pacific record, we find that on the main line of the Lake Superior Division the total expense for conducting freight transportation was $1,255.471.99, while the total freight expenses upon the main line of that division were $2,066,662.93, so that approximately 58 per cent of this expense is found in the group or class called conducting transportation. This, however, is an extreme example. Generally, conducting transportation is about 50 per cent of operating cost. This group consists of such items as station agents, clerks and laborers, train employes, fuel, water, damages to property and in fact each item directly connected with the actual handling and hauling of freight. In the other groups are found such items as would be suggested by the title given to each group, maintenance of equipment, maintenance of road and structures and general expenses. It needs no argu-

BLURRED

ment to show that the total of these groups, or 40 per cent of total operating expenses, should be divided upon a straight ton mile basis for those items have no relation to hauling—where the only difference in cost arises. So with reference to such items as maintenance of road and structures, salaries of general officers and maintenance of equipment no reliable basis can be found for saying that, as to them, there is any difference in the cost of interstate or intrastate freight.

While it would seem that a consideration of the various items going to make up total operating expenses furnishes complete evidence of the truth of this claim, it is fortunate that the matter is put beyond dispute both by former decisions and by the testimony of complainants' witnesses in these cases.

In the case of *Keys v. Northern Pacific Railway Company*, 91 Fed. 47, where the railroad's testimony on the subject was uncontradicted, Judge Amidon found that the cost of hauling intrastate business was twice as great as the cost of *hauling* interstate, but limited his findings strictly to *haulage items of cost*. The haulage items of cost in North Dakota, or "the cost of conducting transportation" was about 50 per cent of the total operating expense. Therefore, in effect, Judge Amidon's decision was that the freight operating expense should be divided between inter and intrastate freight on the basis of about 1 to 150. This same question received elaborate consideration in

PAGES

the case of *Southern Pacific v. Bartine,* 170 Fed. 725. At page 752, Judge Farrington says:

> "* * * The term 'conducting transportation' is used to distinguish that class of operating expenses which is neither a maintenance of way and structure, maintenance of equipment, nor general expense. Now it is only as to conducting transportation that the cost is claimed to be greater for local than for general traffic. Other items of expenditure are constant. They are practically the same for all kinds of traffic. * * *"

This Court in *Chicago, etc., R'y. Co. v. Tompkins,* 176 U. S. 167, described the elements entering into the difference in cost of handling different classes of freight, and an examination of the language used shows that the elements so considered are almost, if not entirely without exception, found in the group of items to which we have referred. It is true that many difficulties are referred to in the opinion in the Tompkins case which have now disappeared under the general development of cost accounting and under the wise regulations with reference to the proper records to be kept, pron ated since that time, not only by the Interstate Commerce Commission, but by the Railway Commissions of the various states.

When the Minnesota Commission was engaged in making the investigation of rates, already described in this brief, Mr. Gray, the Comptroller of the Northern Pacific Railway Company, with is assistant, Mr. W. G. Johnson, entered upon an investigation of cost, and Mr. Gray's conclusions were presented to the Commission upon the hear-

BLURRED

ing. Upon the application for a temporary injunction in these cases the affidavit of Mr. Johnson upon the same subject was presented.

Mr. Johnson said (Vol. 8, p. 4119, N. P. Record):

> "Q. In other words, Mr. Johnson, so that we will understand each other, I have here what I believe is a copy of your affidavit, and I will read that portion. (It occurs on page 6, Mr. Butler, of one of the affidavits given by Mr. Johnson. My copy is not dated.) 'That in the opinion of this affiant, the cost of hauling freight included in the classes of business local to state, exclusive of all other service, is about two and one-half times as much as the cost of hauling through freight in through trains.'
>
> A. Yes, sir; *'hauling'*—I want to emphasize the word hauling; it does not speak of all operating expenses."

The italics in this instance appear in the original record.

Again on page 4120:

> "Q. There is no reason that you know of why a ton of interstate freight from here to the coast should be credited per mile with a greater or less proportion of the President's salary than a ton of intrastate freight between here and Anoka, is there?"

And after a change of the word "credit" to "charged" the following answer was given by Mr. Johnson:

> "A. That is a very deep question, Mr. O'Brien, and one that I would not care to answer without proper reflection. As I have previously stated, we never have gone beyond the cost of physically handling and hauling the freight; and I think that in the merchandise hearing before the Commission, Mr. Gray, the

PAGES

> Comptroller of the Northern Pacific, stated clearly that he didn't make any attempt to go beyond that point; that the other factors were such as to leave the question a very open one as to what should be charged or should not be charged and what the proper basis should be."

In this connection we feel justified in again calling the Court's attention to the testimony of Mr. Gray, given in the Missouri rate case, the record of which is now before this Court, *Knott, et al. v. Chicago, Burlington & Quincy R. R. Co.*, which will be found fully discussed in the briefs filed in that case.

All this clearly establishes that the only difference per unit in the cost of the service occurs in the items going to make up the first group which is described as conducting transportation.

It can hardly be claimed that a railway company could not keep the simple record of the total tonnage of each class carried upon through as well as upon local trains.

With this information properly entered upon the records, there would be no necessity for assuming any outside condition in finding cost, but as there is nothing upon the books to show the relative cost of hauling through and local trains, recourse must be had to Mr. Hillman's method, which was, to take the expense per ton mile upon the branch lines where there is only one class of service, all local, as the expense per ton mile of local freight upon the main line, and, although tthe method is unfair to freight carried upon local trains and re-

BLURRED PA

sults in finding for it an excessive cost, it affords a test which entirely destroys the findings of the Master in these cases.

Cost on Branch Lines.

Again referring to Table 1, 3-M Hillman, Volume 9, Northern Pacific Record, we find that upon the Northern Pacific road the cost of freight service upon the branch lines touching Minnesota is segregated upon each division from the main line cost; thus upon the Lake Superior Division the total freight service upon the branch line connected with that division is given as $58,305.26. There is no such thing as a through freight train upon any of these branches, but all of the freight trains operating thereon are local trains stopping at any point required. It is a matter which we presume the Court will take judicial knowledge of, that branch lines are commonly operated at an actual loss; they constitute feeders and are in truth an expense incurred for the purpose of bringing to the system freight small in quantity upon each branch, but in the aggregate resulting in heavy traffic upon the main line.

The total tonnage upon the branch lines is easily obtained and was obtained by Mr. Hillman during his investigations, and it is practically self-evident that a division of total branch line expense by total ton miles upon such branches would give a unit cost which must be greater than the cost of local service upon the main line. This fact is

conclusively established by the witnesses for complainants. In the Minneapolis & St. Louis case Mr. Tittemore, the Freight Traffic Manager of the Minneapolis & St. Louis railroad, testified upon the subject, beginning at Volume 3, page 1027, Minneapolis & St. Louis record No. 601.

Mr. Hill said (Vol. 3, p. 1306, Great Northern record No. 600):

> "* * * But take it in Minnesota, on branch lines, for six or eight weeks during the season when grain moves, there would be a considerable business, from a half to three-quarters of the capacity of the train; you might occasionally get a train to its full capacity, but I don't think they would run over a half or three-quarters. That would apply for six or eight weeks. Then you would find a train that had a capacity of forty cars moving with twenty to thirty cars, and occasionally might go up to thirty-five or even forty, but not often. The rest of the time there might be from five to fifteen cars, and fifteen would not occur very often. Sometimes, when the business is so very light, we try to accommodate it by running tri-weekly, but in that case the wages have to be paid to the men whether they are working or not, and the agents and stations and all that expense has to be incurred. * * *"

When speaking of the cost of construction and the economical handling of freight, Mr. Hill said (p. 1262, same record):

> "* * * And then if a branch line hadn't a main line to help it, it wouldn't live,—I don't know one that ever did; branch lines have got to be feeders,—a great many people call them 'suckers.' We have some in Minnesota that we would be glad to give away, if the State would permit us, we have some branches that

we would like to donate to the state and be rid of the expense of running them."

Again, at page 1311, same record:

"Q. There would then seem to be, if that is a proper classification of the lines, a larger percentage of branch line mileage and service in the state of Minnesota than there is main-line service and mileage, and if I understand your testimony that, taking the branch line service into consideration particularly, there is a lesser efficiency, both in the equipment and the results obtained from engine and car efficiency than is procured from that on the main line service; would that be an important element in considering this extra cost in the state?

A. It certainly would. In the main-line business, where the traffic is heavy, the certain fixed charges are distributed over a greater number of tons. If we run two trains a day between here and Breckenridge, or six freights a day, there would be no difference in the number of station agents or their wages. Ties would not rot any faster and the banks would not wash any faster by the action of the weather. The heavier the traffic—that is a well established rule—the heavier the traffic the lower the cost can be made."

Mr. Elliott said, (Vol. 7, p. 3183, Northern Pacific record No. 599):

"Q. Is it not true, as you stated in your examination last week, that the highest relative expense is found upon the branches?

A. That is right.

Q. Now, if you would take all of your branches in the state of Minnesota, or all of your branches which touch the operating divisions in the state of Minnesota, and ascertain that all of the freight carried upon those branches is local freight, and ascertain the total cost of transporting it, would you not

have arrived at the very highest cost of transporting local freight in the state of Minnesota?
A. You probably would have, yes, sir."

In finding generally that intrastate freight cost 2½ times per ton mile as much as inter, the Master ignored each of these considerations. Had the extra cost been based on Mr. Johnson's testimony or upon the branch line cost or upon Hillman's testimony or had the extra cost been confined as it must be to the group of items, in which only it can occur, the relative cost for intrastate and interstate being about 1.40 to 1 on the Northern Pacific and 1.65 to 1 upon the Great Northern, as given by Mr. Hillman, would have been found to be correct.

The Testimony Upon Which the Master Based His Findings as to Cost.

The Master entirely disregarded Mr. Johnson's analysis of cost as well as the obvious result following a consideration of the branch line cost and found that intrastate business generally cost two and one-half times as much as interstate business, saying (Vol. 1, p. 258, N. P. Record):

> "The Master finds from the weight of testimony that the cost per ton mile of doing state freight business is at least 2½ times as much as the cost in doing interstate freight business in Minnesota and that the testimony would amply sustain, if it does not compel, a finding that such relation of cost is 3 to 1. * * *"

The Master in finding this extra cost for doing state business must have meant hauling only, but

in his subsequent computations he applied the excess multiple to every class of operating expenses.

Mr. Elliott first testified in these cases on November 18, 1908 (Vol. 4, p. 1216, Northern Pacific record). On November 20th, he gave the following testimony (Vol. 4, p. 1313, Northern Pacific record):

> "Q. Are you able to state the relative cost of transacting state and interstate business?
> A. I am not, no sir."

On April 30, 1908, Mr. Elliott again presented himself as a witness and on that occasion produced Complainants' Exhibit 80-Elliott, which was prepared by Mr. Johnson and was the computation upon which Mr. Elliott based his estimate of cost. It is remarkable that Exhibit 80 does not show any of the data which Mr. Johnson in his testimony claimed should be taken into consideration in determining cost. It, however, shows total mileage in the system, mileage in the state, equipment, average capacity of equipment, freight and passenger, and many other statistics which convey no information upon the subject of cost. It will, however, be observed that the exhibit contains the average haul for Minnesota intrastate business, and the average haul for interstate business touching Minnesota.

As we have already said, to ascertain the average haul of each class of business it was necessary to consider the origin and destination of each item of freight and of each passenger carried. Notwithstanding this, in preparing Exhibit 80-Elliott, Mr. Johnson ignored the distinction as to through and

local freight upon each division, and also ignored the fact that difference in cost is found only in the items constituting conducting transportation. To this misleading and entirely unsatisfactory tabulation Mr. Elliott by his testimony added a mass of irrelevant and obscure statements, occupying, with the exception of one interruption, nearly 17 pages of the record (Vol. 7, pp. 3128 to 3144, inclusive). Towards the conclusion of this statement Mr. Elliott said (p. 3144):

> "—all lead me to the conclusion that the so-called *local short haul* intrastate business costs anywhere from three to six or seven times as much as the so-called *long haul through* interstate business. * * *"

It will be observed from the above statement by the italics used by us that Mr. Elliott qualified intrastate business by local short haul and again qualified interstate business by long haul through, and that the answer entirely ignores what we have already shown to be the only real distinction in cost, namely, through or local upon each division. At page 3172 Mr. Elliott testified as follows with reference to this testiomny:

> "Q. Then when you in your testimony used the term 'long-haul interstate freight' or 'short-haul local freight,' you did it for the purpose of referring to a particular kind of interstate freight and a particular kind of state freight?
>
> A. Yes, sir.
>
> Q. And you were not attempting to compare interstate business generally with state business generally?
>
> A. Not in that particular part of the testimony."

If we stopped here it would be apparent that Mr. Elliott gave no testimony as to the relative cost of state and interstate business. The Court finds, however, that Mr. Elliott qualified this admission upon his re-direct examination where he testified as follows (Vol. 7, p. 3197):

> "Q. Now, in your direct examination, if you will refer to page 3419 (Reporter's transcript) beginning at the bottom of the page, where you say 'all lead me to the conclusion that the so-called local short-haul intrastate business costs anywhere from three to six or seven times as much as the so-called long-haul through interstate business'—by that statement did you mean to compare the average cost of the state business with the average cost of the interstate business?
>
> A. That was my intention in making that statement in my direct examination last week."

This is simply another evidence of the special pleading indulged in by Mr. Elliott when he was upon the stand and is merely a repetition of the adroit manner in which he often evaded questions put to him on cross-examination. Thus at page 3172-3, Volume 7, on cross-examination he testified as follows:

> "Q. When you were comparing the cost of interstate business with state business, you confined your testimony to that character of interstate business described by you as long-haul interstate business which is carried at the minimum of expense?
>
> A. Yes, sir.
>
> Q. And when you spoke of the state business you referred exclusively to the short-haul local intrastate business, being the character of freight that is carried at the very highest expense?
>
> A. Yes, sir."

Now mark how alert Mr. Elliott was to take advantage of a change in the form of the inquiry, which occurred in the very next question put to him upon page 3173:

> "Q. And your conclusions as to how much more the state business cost than the interstate business, were based entirely upon your comparison between the most expensive state business and the least expensive interstate business?
>
> A. No, sir; my conclusions are based upon my general experienc as a railroad officer."

If we turn to Mr. Elliott's original statements given upon direct examination we will find that his conclusions are that intrastate business is more expensive than interstate business, but that when he gave a difference in the relation of actual cost he confined his testimony, as already said, to the short-haul local and the long-haul through business. And so if we again take up his cross-examination on page 3173 we find that when he was compelled to answer categorically upon that question he again admitted that his statement as to a difference of from three to seven times in cost referred only to those two classes. Thus, page 3173:

> "Q. Did you not say in your testimony that, in your judgment, the short-haul intrastate business cost per ton mile from three to six or seven times as much as the long-haul interstate business?
>
> A. Yes, sir.
>
> Q. Were you not at that time comparing the most expensive class of state business with the least expensive class of interstate business?
>
> A. That is correct.

Q. You just said you were not, that you were depending upon your general experience.

A. You asked me how I came to my conclusions; I told you. When you talked about comparisons I was comparing. But the short-haul interstate business is just as expensive as the short-haul state business.

Q. You have made no statement, then, in your testimony, as to how much more the state business, as a whole, cost per ton than the interstate business, as a whole?

A. I have not made such a statement, no, sir. I said this, that the—

Q. And you are unable to make any such statement as that, are you not?

A. May I answer the question?

Q. Well, will you answer my question: You are unable to make any such statement as that, are you not?

A. I stated, in the early part of my testimony, that I knew of no way that you could subdivide the accounts so as to show the exact cost of the state business and your interstate business.

Q. And you have made no attempt to subdivide it?

A. I have made none, no, sir.

Q. And you are at this time unable to say what it costs you to transact the freight business within the state of Minnesota?

A. I am unable to say, sir, yes."

Now, if we turn to Mr. Elliott's testimony referred to by the Court, appearing upon page 3197, it will be easily seen that the question propounded to him upon re-direct examination was so framed as to enable him to give the answer which he did and evade the true effect of his testimony exactly as he evaded it by the answer given upon his cross-examination at page 3173, to which we have already referred.

Let us now combine with this testimony of Mr. Elliott's the Master's findings as to cost of intrastate business for the purpose of ascertaining whether or not they can be reconciled, or whether any tribunal could come to any coherent conclusion which could be anything less than a finding that Mr. Elliott gave no evidence as to cost. The Master says:

> "Doubtless the most marked difference in transportation cost depends upon whether the freight handled is through or local with respect to the several operating divisions of the line."

Mr. Elliott said that through and local freight so defined each contained state and interstate business. He said in November, 1908, he was not able to state the relative cost of transacting state and interstate business (p. 1313) and repeated that statement in May, 1909, (Vol. 7, p. 3174). At the same time he said he did not know what proportion of the tonnage carried upon through or local trains, as we use the term here, was state or interstate (p. 3172), but in April, 1909, he said that "the so-called *local short-haul* intrastate business cost anywhere from three to six or seven times as much as the so-called *long-haul through* interstate business," which statement, he said, was a comparison of the most expensive intrastate with the least expensive interstate business. And, finally, upon re-direct examination he said that he was then comparing the average cost of state business with the average cost of intrastate business (p. 3197). Upon testimony of this character from a

witness who has distinctly stated more than once that he was unable to tell the cost, the Master finds the cost of intrastate freight to have been 2½ times as much as interstate freight, and says, (Vol. 1, p. 258, Northern Pacific record):

> "* * * The testimony would amply sustain, if it does not compel a finding that such relation of cost is as 3 to 1."

This is a greater disparity in cost than was ever found in previous cases.

Mr. Hill's Testimony Upon Cost.

Mr. James J. Hill was called upon to testify as to cost and testified as follows, (Vol. 3, p. 1304, Great Northern record No. 600):

> "Q. Now, I would like to pass to the question, Mr. Hill, that has been considered by one or two other witnesses, and that is the additional cost involved in the movement of local business or *short-haul business* as compared with that involved in the movement in so-called *long-haul business*. There is an exhibit in this case entitled 53-Ward, introduced at the time Mr. Ward was on the stand on this subject, from which exhibit it appears, from the records and computations, that the average haul of freight business, local to Minnesota, for the year ending June 30, 1908, is 113.3 miles, and the average haul of all interstate traffic touching Minnesota, is 557.6 miles. Now, that average haul of the local business, 113 miles, would comprise, roughly speaking, the distance from St. Paul to Melrose, would it not?
>
> A. Just about."

Again on page 1305:

> "Q. Have you had occasion to consider, during your long experience, the relative cost per ton mile of handling *short-haul* as against the *long-haul* business?"

And thereupon Mr. Hill entered into an explanation of the difference in cost between long and short haul business, and finally on page 1312 was asked this question:

> "Q. Have you considered this matter sufficiently, Mr. Hill, to be able to express an opinion as to how much more—how many times more—on the average, the cost of the *short-haul* business in the state would be than the cost of the *long-haul*, as shown by these figures and your general knowledge and study of the conditions, on the Great Northern in this state?"

The portion of Mr. Hill's answer to this question which is material is this:

> "* * * I would say that from three to four times would be very low. * * *"

The italics in the foregoing quotations are ours, and sufficiently indicate the adroitness with which the questions were put; and that, Mr. Hill's conclusion was exclusively as to long-haul and short-haul business.

Mr. Frank E. Ward, formerly General Manager of the Great Northern and at the time of his testimony General Manager of the Chicago, Burlington & Quincy lines east of the Missouri river, was called to establish cost.. His testimony appears in Volume 3, pages 1078 to 1133, inclusive. A state-

ment introduced in evidence and marked Exhibit 53-Ward was called to his attention (pp. 1079-1080). The statement was not prepared by Mr. Ward, but was a compilation of other exhibits, introduced in the case, as explained by Complainants' counsel (p. 1089) and its introduction or use was objected to upon the ground that it was incompetent, irrelevant, immaterial and without foundation (p. 1089). It will be noted from the record (pp. 1089-1090) that Mr. Ward was apparently incapable of substantiating or verifying or explaining the exhibit, as he made no attempt to do so, and it was stated that other proof would be introduced for that purpose.

Difference in Passenger Cost.

We will not weary the Court by analyzing the testimony with reference to the difference in the cost of passenger traffic. It must be apparent to the most casual observer that any difference there must be so slight as almost to be negligible.

It is a matter of common knowledge, that of all passenger rates, those to suburban points, which involve the shortest haul, are by far the cheapest. We have already shown, and it is a matter of common knowledge, that passenger rates have never been systematically adjusted. Thus, the purchaser of a thousand-mile ticket is at liberty to ride five miles at two cents per mile, or he may ride at that rate a sufficient distance to use the entire mileage contained in the book; and the passenger living

outside of a large city, but at so short a distance that he can reach his office each morning, habitually, travels upon commutation rates which, as testified by Mr. Scott in the Minneapolis & St. Louis case are often below one cent a mile. For all purposes, therefore, cost of passenger service could be divided between state and interstate business by the number of passenger miles found in each.

The Master's Equated Revenue Basis for Dividing Cost.

The Master found that "the cost *per ton mile* of *doing* state freight business is at least two and one-half times as much as is the cost of doing the interstate freight business." He then properly equated the intrastate ton miles to get the number thereof that would have been produced at the same outlay, had the unit cost in their production been the same as in the production of interstate ton miles. The proportion which the equated ton miles is of the sum of the interstate ton miles and the intrastate ton miles so equated, is the proportion which the intrastate business should bear of the total operating expenses which are actually greater in "doing" intrastate business.

We claim, as before stated, that the extra expense in *doing* intrastate business is found only in the grand division of operating expenses included under the heading "Conducting Transportation," because it is only in the *transportation* of the intrastate business that extra cost is encountered.

The Master, however, applied his percentage of greater cost to all expenses, including maintenance of the plant, traffic expenses, salaries of officers and clerks, law expenses, insurance, and the other administrative disbursements. After making all of his computations on the ton mile basis and giving the results, he attempted to state the proposition in an alternative form, which he called the "equated revenue basis."

This alternative "basis," was not used to help solve the problem of getting at the relative costs, it is simply a way of expressing the result in another form, after the relative costs had been found on the ton mile basis. Without knowing the relative costs in advance, there is no way in which this revenue formula could be used to ascertain them; and after the relative costs have been found on the ton mile basis, it is folly to perform another operation in order to express the relation again in terms of revenue.

The Master says of his alternative revenue formula, at page 217 of Vol. 1, in the Great Northern case, No. 600:

> "It therefore appears that the production of a given amount of revenue in intrastate freight business is attended with greater cost than the production of the same amount of revenue in the interstate freight business, and that such excess of cost is and will be at least 73.77 per cent."

The sole purpose of the so-called *revenue* formula, was to lay a foundation for the foregoing statement, and it seems to us that both the formula

and the statement, tend to confuse rather than to elucidate the issues. The statement is not the expression of an abstract truth in relation to intrastate rates. There are cases in which it is true, and others in which it is not true. The truth of the statement depends entirely in any given case on the ton mile *revenue* on the intrastate business in question, as compared with ton mile *revenue* of the interstate business with which the comparison is made and the ton mile *cost* of each.

The case reported in 163 Fed. 141, involving certain intrastate rates of Arkansas, came before Mr. Justice Van De Vanter, then a judge of the Circuit Court. The rates, as we understand it, had not gone into effect, and there seems to have been no proof that under them, intrastate business would have produced any extra ton mile revenue over interstate business, while it *was* made to appear that it would cost more per unit to handle the intrastate business.

Speaking of that case, under those circumstances, the learned judge said: "It costs more to earn a dollar" in intrastate than interstate business. But what was true under those circumstances might not be true if the intrastate rates produced greater unit revenue than the interstate. Suppose the intrastate ton mile revenue had been six mills, and interstate ton mile revenue was but three mills; interstate ton mile cost two mills and intrastate ton mile cost four mills. Assuming the movement under those circumstances of a sufficient number of ton miles of interstate traffic to produce a dollar,

the cost of handling it would be 50 cents, leaving net, fifty cents. But carrying the same number of tons of intrastate business the same distance *would produce two dollars*, because the intrastate ton mile revenue, in the supposed case, is twice the interstate ton mile revenue, and the cost of handling the intrastate business would be *one dollar*, leaving as net just one-half the revenue. The *cost of earning a dollar* would in that case be the same in each class, just fifty per cent,—but the net profit of handling the same quantity of intrastate business would be twice the profit on the interstate, because in the case assumed where cost is fifty per cent of revenue, and where the intrastate unit revenue and unit cost are each twice as great as interstate unit revenue and unit cost, the intrastate business will, as a matter of mathematical necessity, always be 100 per cent more profitable. On the other hand, it is also a mathematical truth that if intrastate unit revenue be twice interstate unit revenue and intrastate unit cost be three times interstate unit cost, the two classes of the business would be equally profitable. To illustrate, if interstate unit revenue be four mills, and intrastate unit revenue be eight mills; interstate ton mile cost two mills, and intrastate ton mile cost six mills, *each ton mile* in either class in such case would, after paying expenses, produce a net revenue of two mills. In that case it would "cost more to earn a dollar" in intrastate business, because it would take but fifty per cent of each interstate dollar earned, to pay expenses, while it would take 66 2/3

per cent of every intrastate dollar earned to pay expenses. But because the same service which would produce a dollar in interstate business would produce two dollars in intrastate, the latter could pay a larger *per cent* of expense and still have the same unit net profit. The statement of the Master will always be true if the ratio between the costs in intrastate and interstate business is greater than the ratio between the revenues. The statement is technically true in these cases if the Master's finding of relative costs is to be sustained, and not limited in its application to transportation expenses. But the fact that it is technically true by no means shows what it was intended to show, when incorporated into the record by the Master. It was no doubt intended to suggest that the intrastate rates involved were inherently *less profitable* than the interstate rates. As the illustrations we have given show, it proves nothing of the kind. It is a mere irrelevant exploit in percentages.

In the Northern Pacific case the 2.5 is the supposed ratio of intrastate to interstate *cost;* the 1.43 is the actual ratio of intrastate to interstate *revenue.* Neither expresses either the actual unit cost or the actual unit revenue. They are not substantive things; they are mere percentages. If the cost percentage was 1.43, and the revenue percentage was 1.43, the intrastate business would be just 43 per cent more profitable, and if the cost percentage was 3, and the revenue percentage was 3, the intrastate business would be 200 per cent more profitable; but in neither of the latter cases would it *cost more to*

earn a dollar in the intrastate class. In every business having a specific revenue and a specific cost, there is, at the end of any given period of operation, a fixed relation between the revenue and the expenses. In railroad vernacular this percentage is called the *operating per cent.* The Master says, at page 257, Vol. 1, Case 599:

> "Operating per cent is the per cent of gross revenue absorbed by cost of operation."

When the operating per cent is ascertained, it shows the portion of each dollar of earnings that it takes to pay expenses, so that where fifty per cent of each dollar is consumed in earning the dollar, the operating per cent of that business is fifty. The statement of the Master, that his revenue equation shows that it costs more to earn *a given amount of revenue,* in intrastate than in interstate business, simply means when reduced to its ultimate terms, that with the stated relations between costs and revenue in the two classes, the *operating per cent* would be greater in intrastate business by the percentage which results from dividing the percentage between the costs, *by* the percentage between the revenues. To illustrate:

Let intrastate ton mile revenue be twice interstate ton mile revenue, and intrastate cost be 2.5 times interstate ton mile cost. Dividing the 2.50 by 2 gives 1.25. Now, if interstate ton mile revenue be 5 mills, and interstate cost be two mills, intrastate revenue will be 10 mills, and intrastate cost will be 5 mills. In that case the interstate *operating per cent will be* 40; that is it will take

40 cents out of each dollar earned to pay cost; and the intrastate operating per cent will be 1.25 *times forty per cent*, or fifty per cent. We do not add the 25 to the 40 to get the intrastate operating per cent, but we add to the 40 per cent, 25 *per cent of itself*, or ten per cent.

The Master's statement that *it costs more to earn a given amount of revenue in intrastate business* is the exact equivalent of a statement that "it cost more to earn a dollar in intrastate business." As we have seen, that statement in either form simply means that "the operating per cent" is greater in intrastate business. Another form of the statement used in some of the reported cases, which has exactly the same meaning is "it costs more *with relation to revenue*, per ton mile, to do intrastate than interstate business." This phrase could also be transposed into the statement that *the operating per cent is greater in intra than in interstate business.* It is clear that where unit revenue on intrastate business is greater and the unit cost is also greater the question as to whether it costs more "with relation to revenue," to do intrastate than interstate business depends entirely upon what the actual unit revenue and the unit cost in each class is. The unit revenue in each class is generally known, because the total ton miles and the total revenue are known. Before the relation of *cost to revenue* in either class can be stated, the actual unit cost of handling each class *must be known.* In a case where the actual unit cost in each class has not been determined it is manifestly

impossible for a witness to testify as to the differences in cost in the two classes, "with relation to revenue." The Master's statement in these cases is immune from this criticism because before he stated the alleged *revenue relation* he had found as a fact what the relative unit costs actually were.

In the Ames case a witness for the state testified that it would cost ten per cent more "with relation to revenue," to do intrastate than interstate business. That seemed to be the only testimony on the subject on behalf of the state, and this Court in deciding the case quoted and relied upon that testimony. If the phrase "with relation to revenue" were eliminated, and the phrase 'per ton mile" used in its stead, the testimony would be intelligible, and would very likely express what the witness intended. In the absence of any showing as to what the unit revenues and the unit costs were, as to intrastate and interstate business, it was manifestly impossible for the witness to know whether the statement he used was correct or not. If it were true, it would mean that the operating per cent in that state, on intrastate business was ten per cent greater than the operating per cent on interstate, or the operating per cent on "all business," whichever comparison was intended to be made. In order that the witness might be qualified to make the statement intelligently, it would have been necessary for him to know what the actual cost and what the actual revenue was in each class, and if he knew that, it would have been very much simpler for him to have stated it than

to have stated a percentage of a percentage. But if the witness' statement was true the thing which should have been added to the *operating per cent* which was made the standard, was ten per cent of itself, and not *ten per cent* in the abstract, as the illustrations which we have given above demonstrate. If for example the operating per cent with which the comparison was made was sixty, the thing which should have been added to the sixty to express the intrastate operating per cent would have been ten per cent of sixty, or six, and not ten. All the parties seem to have agreed, however, that it was proper to add ten to the operating per cent with which the comparison was sought to be made, and that the Court did. The result no doubt would have been the same in that case whichever course was taken, but in other cases the difference between adding to the operating per cent a percentage of itself, and adding to it an abstract percentage of 100 might be very serious. There are several cases, where this complex problem in percentage has been applied erroneously in the trial courts. Percentages of percentages are very deceiving and difficult to handle in order to get at concrete results. The only safe way to proceed in a case of this kind is to find as a fact what the *unit interstate cost is* and what percentage of that, the actual unit intrastate cost is. In that way a percentage of a concrete thing, and not a percentage of a percentage, is obtained.

Let us now apply this "equated revenue basis" to the actual facts in the Great Northern case. The

actual revenue percentage between intrastate and interstate is shown by Exhibit 53-Ward to be 2.02 to 1, and the Master finds the percentage relation of cost is as 2.5 to 1. The Master divides the 2.5 by 2.02 and gets 1.23 as a resulting percentage. (P. 268, Vol. 1, Case No. 600.)

The tabulated statement appearing between pages 270 and 271 of the record just referred to, shows that there were in the state that year 1,952,426,967 ton miles of interestate freight, and that handling it cost the company, on the Master's basis of cost, $6,676,725.74. From these figures we find the ton mile interstate cost to have been 3.41 mills. Multiplying this cost by 2.5, gives 8.52 mills as the actual *intrastate* ton mile cost in the state. Exhibit 53-Ward, Vol. 6, Great Northern Case (No. 600), shows the actual ton mile revenue for interstate and intrastate business respectively for the fiscal year 1908, to have been,—interstate .681 cents; intrastate 1.381 cents.

Subtracting the interstate ton mile cost from the interstate ton mile revenue, gives net revenue per ton mile, interstate, .340 cents.

Subtracting intrastate ton mile cost from intrastate ton mile revenue gives .529 cents. The net return per unit from intrastate business is nearly double that received from interstate business.

It further appears from the above figures that the interstate *operating per cent* is 50.06. If we add to 50.06, 23 per cent of itself it will give us 61, which is the intrastate *operating per cent*, or the per cent which .852 is of 1.381. The Master's

"equated revenue" operation therefore falls far short of proving intrastate business to be inherently less profitable than interstate.

Before leaving this specific subject of the Master's finding of relative costs, we want to say again that not only is the finding unsupported by the evidence, but the same was applied by the Master to *all* operating expenses, including those which have nothing to do with the haulage of freight. It is a larger *relative cost* for intrastate freight than was ever found by any other court. Even if *the transportation expenses alone* were apportioned on the *equated ton miles,* leaving all other expenses to be divided equally on the *actual ton miles,* the extra intrastate cost so assigned would still be excessive, but that would be giving the finding the widest application to which it is entitled.

HIGHER COST FOR SHORT HAULS IS COVERED BY HIGHER RATES FOR SHORT HAULS.

It was entirely possible for complainants' witnesses to truthfully claim a difference between the cost of *local* short haul and *through* long haul freight. The first is carried on local trains over less than a division, the second on through trains over at least one entire division.

If we turn to the prescribed merchandise rates, attacked in these cases, it will be apparent at a glance that the schedules were framed with that fact well understood by the Commission; thus merchandise of the first class takes a rate of 15.92

cents per cwt. for 25 miles and 60.02 cents for 300 miles.

A concrete example is as follows: A ton of the first class hauled 25 miles, a local short haul, would be paid for at the rate of 12.72 cents per ton mile, while the same shipment hauled 300 miles would be paid for at the rate of about 4 cents per ton mile.

From the rates actually maintained by the company, we have the following (Complainants' Exhibit 36-Baird, N. P. Record, Vol. 9):

Former terminal rate, merchandise first class, 25 miles, 18 cents per cwt. or 14.4 cents per ton mile

Same shipment, 300 miles, 61 cents per cwt. or about 4 cents per ton mile.

The most extreme illustration of this, however, occurs in the lumber schedules.

The rate allowed by Chapter 232, Laws 1907, for lumber in carloads 25 miles is 10.6 cents per cwt. or about 8.8 cents per ton mile, while the lumber rate from the coast was less than *a half cent* per ton mile. (Vol. 3, p. 1128 G. N. Record, No. 600).

VIII.

THE PRESCRIBED RATES ALLOW EARNINGS WHICH ARE ADEQUATE AND COMPENSATORY.

When rates which have been adopted and put into effect are challenged as confiscatory, it is not pertinent to inquire what revenue other rates, whether in effect before or not, would produce. The sole question before the court is as to the sufficiency of the revenue produced by the rates assailed.

Even if confiscatory, the Court will not assume to prescribe new tariffs to take their places, or to direct the restoration of rates abandoned by the companies when the new rates were adopted.

Counsel for complainants instead of directing their testimony to the sufficiency of the revenue under the rates involved in these cases which had been adopted by the companies, persisted in trying the cases and in furnishing testimony and exhibits on the theory that they had a vested right to the rates formerly in force, and to the revenue obtained under them, regardless of the question of their reasonableness per se, and that proof of the receipt of less revenue under the present rates, tended to prove confiscation.

We insist that, except as to the commodity rates which were enjoined, any speculation as to what tariffs *not in effect* would have produced if applied to the same business, was entirely immaterial. We believe that no one claims now that the commodity rates,—which would have affected the Northern

Pacific to the extent of $21,000.00 in round numbers and would have affected the Great Northern to the extent of $83,000.00 (both being the sums found by the Master as above pointed out) would produce confiscation of the property of either road.

The difference between a case involving rates actually in operation and one where new rates are proposed was thus entirely ignored.

The Master found what the revenue from intrastate business under these rates, actually was, and that finding made all evidence as to what it would have been under circumstances which might have existed, but which did not exist in fact immaterial. For this reason and to keep this brief, as far as possible, within reasonable limits, we have refrained from making any reference to many exhibits, which we believe have no possible pertinency, to the real issues before the Court.

We beg leave in passing however to invite a moment's attention to Exhibit 37-Tilton (Vol. 6, case 600), used in the Great Northern case as proof of a "loss" of the kind to which we have just referred, in the passenger business. The amount stated as "reduction in Minnesota," in that exhibit, amounts almost to the total intrastate revenue, and was arrived at in this way. Prior to the adoption of the two-cent fare law, only those passengers who paid three cents a mile, the highest rate, comparatively few in number, were denominated "first class." After the rates were reduced to two cents per mile, all paying *that rate* were called "first class," and as practically all passen-

ger favors were cut off, it enormously increased the proportion of so-called "first-class" passengers, or passengers paying the highest rate, and greatly diminished the number in the other classes. Instead of taking the diminution in its *revenue*, as the measure of the *loss*, this company took the number of passengers appearing as "first class" *after* the adoption of the two-cent fare law, and assuming that the number in that *class* would have been the same if the rates had not been reduced, figured the income it would have received on that number of *first class* passengers at *three cents* per mile, and called the difference between that sum and what it did receive, a loss.

Exhibit 36-Tilton, immediately preceding the one referred to, in the same volume of the record, showed the total actual passenger revenue in Minnesota, on both classes of business for the four years 1905 to 1908, inclusive. From that exhibit it appears that the revenue for 1908 was above the average for the four years, but about $275,000 less than for the year previous.

In the face of the actual facts, thus shown, Exhibit 37-Tilton, in which an intrastate loss of nearly a million dollars is claimed, when considered as evidence actually offered in a court of justice, is grotesque.

The actual diminution in gross passenger revenue in the state, even if it all resulted from these rates, would affect net revenue very much less than the arbitrary increase of nearly $700,000, made by the company in "operating expenses" in the state that

year, to which we have heretofore called attention. But the difference between the revenue of 1907 and 1908, as we said before, is not the question. The question is, *were the revenues of* 1908 *confiscatory*, not whether the revenues of 1907 were excessive.

We append a table showing gross earnings per mile of road of each railway company involved, on its entire system, and in the State of Minnesota for the fiscal years 1907, 1908 and 1909, taken from the verified reports made by the respective companies to the state, abridgments of which are printed in volume one of the record in each case. Also the ratio of the expenses to earnings in the state and on the entire system, during the same years.

Fiscal year 1907:

Gross earnings from operation per mile of road. Percentage of expenses of earnings.

	Minnesota	System.	Minnesota	System
Northern Pacific.....	$14,847.62	$12,573.77	52.77%	54.94%
	Page 61 A	Page 61	Page 45	Page 45
Great Northern	11,159.45	9,606.47	52.33%	58.65%
	Page 61 A	Page 61	Page 45	Page 45
M. & St. L. Ry. Co.	6,966.14	4,789.48	69.05	61.61
Fiscal year 1908:				
Northern Pacific	13,480.15	12,112.82	57.40	58.42
	Page 93 A	Page 93	Page 65	Page 65
Great Northern	9,843.01	8,299.79	61.11	66.34
	Page 93 A	Page 93	Page 65	Page 65
M. & St. L. Ry. Co.....	5,921.11	3,806.76	62.05	69.22
	Page 93 A	Page 93	Page 65	Page 65
Fiscal year 1909:				
Northern Pacific	13,869.38	12,071.46	53.46 or 52.81	55.54
	Page 93 A	Page 93	Page 65	Page 65
Great Northern	9,714.84	7,916.59	53.11	60.43
	Page 93 A	Page 93	Page 65	Page 65
M. & St. L. Ry. Co.	6,561.30	4,061.49	73.06	68.22
	Page 93 A	Page 93	Page 65	Page 65

COPY BOUND CLOSE IN CENTER

The foregoing table shows that earnings per mile of road were very much greater in Minnesota than on the system, while the operating per cent, or proportion of earnings consumed in operation, were in each year less in Minnesota than on the system.

The same reports show a very much larger amount of net earnings in Minnesota in the fiscal year 1909 on the Northern Pacific and on the Great Northern than in the year 1908, the latter being the year as to which the cases were tried. Page 45a of the report of the Northern Pacific for the fiscal year 1908 shows, gross revenue in Minnesota, $13,336.046.87; gross operating expenses for Minnesota, $7,655,350.20; net earnings for Minnesota, 1908, $5,680,696.67. Page 45a of the report of that company for the fiscal year 1909 shows gross earnings from operation in Minnesota, $13,674,241.08; gross operating expenses in Minnesota, (page 45), $7,721,899.87; net earnings in Minnesota for 1909, $5,952,341.21; excess Minnesota earnings, Northern Pacific, 1909, over 1908, $271,371.54.

Page 45a of the report of the Great Northern Railway for the fiscal year 1908 printed in Volume 1 of the Record in that case shows gross operating revenue in Minnesota, $20,226,808.03. The operating expense for that year appearing at page 65 of the company's report differs from the operating expense for that year found by the Master, so that we take the amount as found by the Master, appearing at page 223, Volume 1 of the record in that case, (No. 600) $11,811,414.35, which would show the net earnings for the State of, $8,415,393.68.

Page 45a of the report of the Great Northern for the fiscal year 1909, appearing in Volume 1 of the Record in that case shows gross earnings from operation $20,142,448.80, operating expenses (page 65 of the report) $10,699,192.25, showing net earnings in the state for that year of $9,443,256.55.

The excess net earnings for Minnesota in 1909 over net earnings for 1908, were $1,027,862.87, which sum of itself would pay a large return on the proportion of the valuation of the property of that road assigned by the Master to intrastate business in Minnesota.

The intrastate revenue on the Great Northern for 1909 is not shown in the report separately from the interstate. But the proportion of the excess attributable to intrastate freight must have been greater relatively than the proportion attributable to interstate freight because Exhibit 54 Parker, appearing in Volume 6 of the record in that case shows that in that year the relation of intrastate ton mile revenue to interstate ton mile revenue was as 2.20 to 1, while for the year previous the relation of intrastate to interstate ton mile revenue was as 2.02 to 1.

FINANCIAL CONDITION OF THE COMPANIES AS SHOWN BY THE REPORTS FOR THE YEARS 1907, 1908 AND 1909.

NORTHERN PACIFIC.

The income account of the Northern Pacific appearing at page 31 of its report to the State, printed in Volume 1 of the record, shows that the surplus earnings of the company for that year, after paying all of its operating expenses, fixed charges, and a seven per cent dividend upon its stock was $12,623,929.43, which was added to the general surplus carried in its treasury from previous years.

Its income account, appearing at page 41 of its report for the year 1908, contained in the same volume of the record, shows that after paying all expenses, fixed charges and a seven per cent dividend and appropriating to reserves the sum of $2,784,950.28 there was carried into profit and loss account for that year $6,258,117.84. The entire profit and loss account to that date appears on page 43 of the record, amounting to over $50,000,000. The income account of the company for the year 1909, appearing at page 41 of its report for that year contained in the same volume of the record shows that after paying all expenses, interest and dividends there remained $7,534,350.09, which was carried into the profit and loss account.

GREAT NORTHERN.

The income account of the Great Northern for the year 1907, appearing in its report for that year, and contained in Volume 1 of the record, on a page which is not numbered, but which is opposite page 29, shows that after paying all of its expenses, interest, and a seven per cent dividend on the stock, and paying for the many betterments which that road habitually makes out of its earnings, there remained a surplus of $2,155,703.27 which was added to the surplus of the previous years, amounting to something more than $23,000,000.

The income account of that company for 1908, appearing at page 41 of its report of that year, contained in the same volume of the record, shows that after paying all of the same items of expense as above referred to, and a seven per cent dividend on its stock, there was appropriated to reserves $2,468,832.06 and the sum of $607,263.84 was carried to profit and loss account.

The income account for 1909, appearing on page 39 of its report for that year, and contained in Volume 1 of the record, shows that after paying a seven per cent dividend on its stock that had been largely increased, there was appropriated to reserve $2,789,960.93, and the sum of $847,341.25 was carried to profit and loss.

IX.

IN NO EVENT SHOULD COSTS OF SUIT BE ASSESSED AGAINST PUBLIC OFFICERS HAVING NO PERSONAL INTEREST IN THE CASES.

Each appellant is a public officer and was made a party defendant for the express purpose of enjoining him from taking, *as such officer*, any steps looking to the enforcement of a statute of the state.

Had each not defended the suits he would have violated his duty to the state.

No one of them is charged with official delinquency, on the contrary, each performed only the official duty imposed upon him by law. The Master's fee alone, allowed by the Court amounted to $25,000. If these public officers are personally liable to a judgment for costs in an amount which would beggar the ordinary individual another obstacle will be placed in the way of efficient regulation.

It is not probable that any one of the complainants has personally incurred any of the costs so directed to be taxed. When fixing the Master's fees the Court below ordered their payment by the railroad companies (Vol. 1, N. P. Record, p. 378). We have no doubt they have since been charged to operating expenses.

We desire to emphasize the fact, that, even upon this minor detail, the conclusion of the Circuit Court is directly contrary to the holding of this Court.

Even under the general rule that in equity, costs do not necessarily follow the result, it would seem the Circuit Court would have refrained from ordering judgment for costs against the public officers. To treat, in this respect, these cases as though they were suits between private parties is another evidence of the improper conception of their scope and character entertained by the Master and learned trial Judge, and which we feel led them, unwittingly, from one false step to another resulting in a course undeviatingly erroneous.

CONCLUSION.

The companies in whose behalf this litigation is carried on are operating public highways in the State of Minnesota, by authority of the state. They have come into a court of equity accusing the state of an attempt to deprive them of the right to make a profit on the use of the property devoted by them to the public service.

The gravity of the duty thus imposed on the Court, as well as the respect due to a state government, necessarily required of the complainants the clearest possible showing. Manifestly the first thing they should have shown with a clearness which would have placed it beyond all doubt, was the nature and extent of the property *devoted by them to the public use*, and what it cost them to acquire it. Without this proof there was no question for the Court to pass upon. The complainants furnished no evidence on that subject. As these cases now stand the thing which they claim to have been deprived of an adequate income upon, is not the property *they contributed* to the enterprise, or the money *they invested therein*, or even what those facilities are claimed to be worth in their present condition. The thing they claim to have been deprived of any income upon is an estimate of what it would cost to acquire the highway rights in the land and construct new railroads on the same rights-of-way if their rights therein were surrendered, the existing railroads obliterated, and new ones had to be constructed in their places. There

is no other evidence as to the nature, cost or value of the property. The thing therefore which the state is accused of taking from them is something they never had and never can have. It is a thing that *is not* and never was *devoted to the public service* because it never existed, and never can exist. We have, therefore, refrained from furnishing the court with concrete examples of fair apportionments of value and cost between intrastate and interstate business, as there is no finding of any value to so apportion.

The total mileage and the geographical location of the Minneapolis & St. Louis Railway is such that it cannot be taken as typical of the railway situation in Minnesota. This was so fully explained by Mr. Tittemore in his testimony in that case that there is no necessity for us to enlarge further upon it. The important and material questions are raised by the showing made in the Northern Pacific and Great Northern cases.

Aside from the question of interference with interstate commerce, we have as to the two railway systems, last named, this situation:

That during all of the years since the rates in controversy, except the commodity rates, were in force, each railway has continued to pay from its railway operation alone its operating expenses, interest and taxes, seven per cent upon its capital stock, and has each year accumulated and set aside a handsome surplus.

The capital stocks upon which these large dividends have been paid represent property other than

that used in transportation; and while the amount of such other property is not disclosed, enough appeared to indicate its enormous value. The result is that these outside properties may be held for increased values, the public in the meantime paying dividends upon the entire capital stock, a part of which was used for their acquisition.

The dividends thus paid do not show the actual net earnings, to again quote, the Master said, speaking of the Northern Pacific:

> "* * * and its balance sheet for the whole system of April 30, 1908, (Exhibit C. C. Gray) shows a clear surplus of $52,900,073. * * *"

Even upon the Master's findings, extreme as they are, the challenged rates allow from intrastate business, sufficient net returns to permit of excessive dividends upon capital stock, *apportioned upon the same basis as the Master apportioned reproduction cost.*

It has been fully established that the main result of the Legislative acts and orders complained of in these cases was to equalize rates, the actual reduction in revenue, if material under the circumstances, being so small as to be almost negligible. In any event, it must be conceded that if the rates prescribed are confiscatory, the old rates would under the valuation and the decision in these cases be also confiscatory.

In the allegations of the complaints charging interference with interstate commerce, and in the findings and decisions of the Circuit Court upon

that question, it is said that the original rates were relatively fair; but, as we have said, if the methods adopted upon the second subdivision of these cases for ascertaining and apportioning value; ascertaining and apportioning cost of service, and the conclusion as to the amount of the necessary return are upheld, they were in fact confiscatory as originally and voluntarily adopted by the Railroad Companies themselves.

These respective positions, first that the original rates were relatively fair, and second, that the prescribed rates cause confiscation, are under the evidence produced in these cases, demonstrably and plainly self-contradictory.

It was to avoid the disclosure of that fact that the multitude of elaborate tabulations were presented in these cases by complainants. Tabulations in which imaginary losses in and deductions from revenue were predicated upon hypotheses absolutely foreign to the questions involved, to many of which, as already said, we have purposely refrained from referring, in order that we might, if possible, direct the attention of the Court to those portions of the record, only, which to us seem material and decisive of the issues in these cases.

Considering the enormous return received by each of these roads from its entire operations, the fact that per mile of road the earnings in Minnesota under the rates in controversy are greater than anywhere else upon the system, the finding that intrastate freight yields per unit a much higher revenue than does interstate, the indisputable

fact that the rates will allow a large return upon actual capitalization, we find it impossible to understand how the conclusion of confiscation can be sustained.

Sufficient, in itself, as is the income thus found by the Master, it is apparent that the true net income from intrastate business was much larger unless every extreme position taken by the Court be sustained. This includes valuation, apportionment of value, cost of service and exclusion of outside earnings particularly by subsidiary express companies.

If the Circuit Court erred as to any one of these questions, the final conclusion is wrong, but so far as we are able to determine, each position taken by the Master and Circuit Court was directly contrary to the holdings of this Court, in every case where that particular question was involved.

We keenly appreciate the many short-comings and imperfections of this brief, particularly in view of the importance and far-reaching result of the decisions to be announced. We feel, that in presenting these appeals, we ask for the establishment of no new rule of law, for no new construction of the Federal Constitution, nor, for any new delimitation of the respective rights of the state and the railways. We believe that each claim we have advanced is in harmony with the prior adjudications of this Court.

Believing thus, we respectfully but confidently submit the decrees appealed from should be reversed.

GEORGE T. SIMPSON,
Attorney General.

LYNDON A. SMITH,
Assistant Attorney General.

EDWARD T. YOUNG,
THOMAS D. O'BRIEN,
Of Counsel.

APPENDIX A.

CHAPTER 176.

An Act Giving to the Railroad and Warehouse Commission Jurisdiction Over Freight Rates and Classifications, and Power to Inspect Books of All Common Carriers in this State.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. All common carriers subject to the laws of this state shall have the right in the first instance to prescribe and publish, as required by law, all classifications and tariffs, rates and charges, together with rules governing the same, including minimum weights for the transportation of any freight articles between points or stations in the State of Minnesota; this act shall include all terminal and switching charges. There shall be but one classification, which shall be uniform on all the railroads in this state, and shall govern in all state commerce.

Section 2. In addition to the present requirements for publishing tariffs, rates, charges and classifications, all common carriers in this state shall, whenever any new tariff or classification or any amendment to any tariff or classification is published either by itself or the commission, post in a conspicuous place in every depot where the

public would be affected, a notice printed in large, legible type, stating that changes have been made, indicating upon what articles or commodities, and where the new tariff, classification or amendment may be seen.

Section 3. The schedule of rates and charges for the transportation of freight and cars, together with the classification of such freights, minimum weights and rules now in effect, and all rates, charges and classifications published by any common carrier after the passage of this act shall be deemed just and reasonable and shall not be changed except upon the order of or by the written consent of the railroad and warehouse commission, hereafter called the commission. The terms of this act shall also apply to all schedules of rates and charges published by two or more common carriers jointly.

Section 4. Nothing in this act shall apply to the carriage, storage, or handling by any common carrier, of property free or at reduced rates, for the United States or the State of Minnesota, or for any municipal government or corporation within the state, or for any church, religious society or charitable purpose, or to or from fairs or expositions, or for stock breeding purposes, or for carrying seed grain.

Section 5. Any common carrier desiring to change or discontinue any published rate, charge or classification, minimum weight or rule governing the same to which it is a party, shall make

application to the commission in writing, stating the changes in rules, rates, charges, or classifications desired, giving the reasons for such change. Upon receiving such application, the commission shall fix a time and place for hearing, and give such notice to interested parties as it shall deem proper and reasonable, and after hearing all the evidence offered, if the commission find that it is reasonable, fair and just to both shippers and carriers that the change should be allowed as asked for, it shall grant the application; otherwise, it shall deny the same, or may grant the same in a modified form. Passenger rates are not affected by this act.

Section 6. Upon the application of any carrier or carriers to the railroad and warehouse commission, stating that they desire to put in an emergency rate for the protection of the interests of such carriers or shippers, the commission may before such rate is established and without the notice and hearing required by section five, authorize the restoration of the rates existing at the time of such application and fix the time within which such restoration may be made, and the time so fixed may be extended in the discretion of the commission as the circumstances of the case may require. Nothing in this act shall be held in any way to limit or modify the rights and powers of the commission to investigate, inquire into, prescribe and publish what it may deem to be just and reasonable rates, charges and classifications to govern common carriers in this state.

Section 7. Any common carrier violating any of the provisions of sections 2, 3 and 5 of this act, shall be subject to a penalty of one hundred dollars for each and every day such violation shall continue, to be recovered in a civil action in the name of the State of Minnesota by the attorney general.

Section 8. It is hereby made the duty of the commission to keep itself informed as to whether common carriers in this state are granting rebates or in other particulars are failing to comply with the laws of this state. For this purpose power is hereby conferred on the commission or its agent to at any proper time make thorough and full examination of all books, vouchers, papers and accounts of any and all common carriers of this state. Any officer, agent, employe of any railroad company in charge of such books, vouchers, papers and accounts who shall fail or refuse to submit the same for examination of the commission or its agent, shall be guilty of misdemeanor. The provisions of this section shall in no way interfere with the duties of the public examiner.

Section 9. All acts and parts of acts inconsistent with this act are hereby repealed.

Section 10. This act shall take effect and be in force from and after its passage.

Approved April 14, 1905.

APPENDIX B.

CHAPTER 350.

Joint Resolution Relating to Freight Rates on (Interstate) Traffic.

WHEREAS, The joint committee appointed January 11th to inquire into the question of freight rates, find that comparing the existing rates in this state with the rates in force in the states of Illinois and Iowa, our people are paying much higher rates than are the shippers of the states named, which seem to be both from point of location, development, and character of business, fair states with which to make comparison, and

WHEREAS, In the two states named they have but one tariff of rates which applies to or from all points, while the system which has grown up in this state provides:

1st. For a tariff known as the distributing tariff, which applies to and from all points recognized as distributing points.

2nd. For a tariff known as a distance tariff, which applies between all stations not terminals, the distance tariff usually bearing a higher rate than the distributing tariff.

(These two apply to classified freights.)

3rd. Are the commodity tariffs which in all cases carry a lower rate, and

WHEREAS, Each railway company issues in the first instance its own tariffs, resulting, as shown by examination of the tariffs of the various roads, in a lack of uniformity both in the matter of the schedule of rates and the percentage in the class rates that each class bears to the first, and

WHEREAS, The railroad and warehouse commission is the proper tribunal and the only body properly equipped to undertake the work of securing an equitable, intelligent and fair readjustment of the rate situation in this state;

NOW, THEREFORE, BE IT RESOLVED, By the Senate, the House concurring: We recognize the prevailing conditions which seem to warrant the existence of a distributing and a distance tariff, and believe that in maintaining a distributing tariff it is possible to provide not only several points in the state which are valuable to the people as sources of supply, but afford a home market for our products. We believe, however, the two tariffs should show but little difference in the rate for a given mileage, —in no case should the difference exceed five per cent.

RESOLVED FURTHER, The railroad and warehouse commission is hereby directed to undertake the work of securing a readjustment of the existing freight rates in this state, which will give a more uniform system of rates throughout the state and a uniform scale of percentages which each class rate shall bear to the first class, the readjustment to secure a substantial reduction in the existing merchandise rates.

Approved April 14, 1905.

APPENDIX C.

BEFORE THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA.

In the Matter of the Investigation of the Reasonableness of the Merchandise and Commodity Tariffs of Rates and Charges between Stations in the State of Minnesota, on the Several Lines of Railroad.

In the above entitled matter, the Commission having heard the evidence, finds as facts in relation to the merchandise rates on the line of the Northern Pacific Railway Company:

First. That the Northern Pacific Railway Company is a corporation, organized and incorporated under the laws of the State of Wisconsin, and is operating a railroad through various parts of the State of Minnesota, and carries freight and passengers for hire.

Second. That the terminal and distance freight rates on merchandise now charged by the Northern Pacific Railway Company on classes 1, 2, 3, 4, 5, "A," "B," "C," "D" and "E," as shown by the so-called "Western Classification," between stations in the State of Minnesota, are unreasonable.

Third. That the merchandise rates on classes 1, 2, 3, 4, 5, "A," "B," "C," "D," and "E," as shown in Exhibit "A," hereto attached and made a part of this order (according to said Western Classification, with exceptions and changes made by the Min-

nesota Commission), are reasonable maximum rates between all stations on the line of the Northern Pacific Railway Company in the State of Minnesota, and what are known as terminal or distributing stations on said railway in said state, and that a rate five cents higher than the rate shown in Exhibit "A" is a reasonable maximum rate between stations on the line of said railway in this state, neither of which is a terminal or distributing station.

It is therefore ordered, that the reasonable maximum rates on said classes 1, 2, 3, 4, 5, "A," "B," "C," "D" and "E," are reduced and fixed at the rates shown in said Exhibit "A" between all stations on the line of said railway in the State of Minnesota, and what are now known as terminal and distributing stations on said railway in said state, to-wit: Minneapolis, St. Paul, Duluth, Stillwater, St. Cloud, Brainerd, Fergus Falls, Moorhead, Crookston, Sauk Center, Detroit and such other stations as may hereafter be made terminal or distributing stations, and the Northern Pacific Railway Company is hereby forbidden to charge any higher rate than that named in said Exhibit "A." This order does not prevent the charging of a lower rate than that provided by Exhibit "A," but in case a less rate is charged on one class, all classes must be reduced so as to preserve the relative relations between classes fixed in Exhibit "A."

Until the further order of the Commission, said Railway Company may charge a rate of five per

cent. more than shown in Exhibit "A" for shipments between stations, neither of which is a terminal or distributing station.

This order shall be in force thirty days after its service.

Dated St. Paul, Minn., September 6th, 1906.

By the Commission,

A. C. CLAUSEN,

Secretary.

NOTE.

1. The matter of joint rates will be the subject of a future order when the necessity for the same is presented.

2. When issuing a schedule of rates, the fraction of a cent, 1 to 24 one-hundredths may be dropped; 25 to 75 one-hundredths may be called one-half cent, and 76 to 99 one-hundredths may be called one cent.

3. In case the Railway Company, in putting in a new schedule of rates, fails to so adjust the "in" rates as to protect the jobbers at the manufacturing stations other than St. Paul, Minneapolis and Duluth, the Commission will undertake to make the necessary adjustment.

St. Paul, Minnesota, September 7, 1906.

RAILROAD AND WAREHOUSE COMMISSION OF MINNESOTA.

Schedule of Reasonable Maximum Terminal and Distributing Merchandise Rates.

When rates for exact distance are not shown, the rates for the next greater distance as shown on Tariff may govern.

Governed by Western Classification, with exceptions and changes made by the Railroad and Warehouse Commission of Minnesota.

Inter-station Distance rates (other than terminal or Distributing Rates) can be made based on 5% above the rates shown in this schedule.

When preparing a schedule of rates the fraction of a mill, 1 to 5/10ths may be dropped; 6 to 9/10ths may be called one mill.

VERTICAL IN BOOK

Rates for	Merchandise in cents per 100 lbs. Percentage Scale Relation. 100%	83 1/3%	66 2/3%	50%	40%	45%	35%	30%	Special Carload Classes in cents per 100 lbs. 25%	20%
	1	2	3	4	Fifth Class	A	B	C	D	E
5 miles	12.00	10.00	8.00	6.00	4.80	5.40	4.20	3.60	3.00	2.40
10 miles	12.98	10.82	8.65	6.49	5.19	5.84	4.55	3.89	3.25	2.60
15 miles	13.96	11.63	9.31	6.98	5.58	6.28	4.89	4.19	3.49	2.80
20 miles	14.94	12.45	9.96	7.47	5.98	6.72	5.23	4.48	3.74	2.99
25 miles	15.92	13.27	10.61	7.96	6.37	7.16	5.57	4.78	3.98	3.18
30 miles	16.90	14.08	11.27	8.45	6.76	7.61	5.92	5.07	4.23	3.38
35 miles	17.88	14.90	11.92	8.94	7.15	8.05	6.26	5.36	4.47	3.58
40 miles	18.86	15.72	12.57	9.43	7.54	8.49	6.70	5.66	4.72	3.77
45 miles	19.84	16.53	13.22	9.92	7.94	8.93	6.94	5.95	4.96	3.97
50 miles	20.82	17.35	13.88	10.41	8.33	9.37	7.29	6.25	5.21	4.16
55 miles	21.80	18.17	14.53	10.90	8.72	9.81	7.63	6.54	5.45	4.36

60 miles.....	22.78	18.98	15.19	11.39	9.11	10.25	7.97	6.83	5.70	4.56
65 miles.....	23.76	19.80	15.84	11.88	9.50	10.69	8.32	7.13	5.94	4.75
70 miles.....	24.74	20.62	16.49	12.37	9.90	11.13	8.66	7.42	6.19	4.95
75 miles.....	25.72	21.43	17.14	12.86	10.29	11.58	9.01	7.72	6.43	5.14
80 miles.....	26.70	22.25	17.80	13.35	10.68	12.02	9.35	8.01	6.68	5.34
85 miles.....	27.68	23.07	18.45	13.84	11.07	12.46	9.69	8.30	6.92	5.54
90 miles.....	28.66	23.88	19.10	14.33	11.46	12.90	10.03	8.60	7.17	5.73
95 miles.....	29.64	24.70	19.76	14.82	11.86	13.34	10.37	8.89	7.41	5.93
100 miles.....	30.62	25.52	20.41	15.31	12.25	13.78	10.72	9.19	7.66	6.12
105 miles.....	31.60	26.33	21.06	15.80	12.64	14.22	11.06	9.47	7.90	6.32
110 miles.....	32.58	27.16	21.72	16.29	13.03	14.66	11.40	9.77	8.15	6.52
115 miles.....	33.56	27.97	22.37	16.78	13.42	15.10	11.75	10.07	8.39	6.71
120 miles.....	34.54	28.78	23.02	17.27	13.82	15.54	12.09	10.36	8.64	6.91
125 miles.....	35.52	29.60	23.68	17.76	14.21	15.98	12.43	10.66	8.88	7.10
130 miles.....	36.50	30.42	24.33	18.25	14.60	16.43	12.78	10.95	9.13	7.30
135 miles.....	37.48	31.23	24.98	18.74	14.99	16.87	13.12	11.24	9.37	7.50
140 miles.....	38.46	32.05	25.64	19.23	15.38	17.31	13.46	11.54	9.62	7.69
145 miles.....	39.44	32.87	26.29	19.72	15.78	17.75	13.80	11.83	9.86	7.89
150 miles.....	40.42	33.68	26.94	20.21	16.17	18.19	14.15	12.13	10.11	8.08

PAGE BOUND WE

155 miles.....	41.40	34.50	27.60	20.70	16.56	18.63	14.49	12.42	10.35	8.28
160 miles.....	42.38	35.32	28.25	21.19	16.95	19.07	14.83	12.71	10.60	8.48
165 miles.....	43.36	36.13	28.90	21.68	17.34	19.51	15.18	13.01	10.84	8.67
170 miles.....	44.34	36.95	29.56	22.17	17.74	19.95	15.52	13.30	11.09	8.87
175 miles.....	45.32	37.77	30.21	22.66	18.13	20.39	15.86	13.60	11.33	9.06
180 miles.....	46.30	38.58	30.86	23.15	18.52	20.84	16.21	13.89	11.58	9.26
185 miles.....	47.28	39.40	31.52	23.64	18.91	21.28	16.55	14.18	11.82	9.46
190 miles.....	48.26	40.22	32.17	24.13	19.30	21.72	16.89	14.48	12.07	9.65
195 miles.....	49.24	41.03	32.82	24.62	19.70	22.16	17.23	14.77	12.31	9.85
200 miles.....	50.22	41.85	33.48	25.11	20.09	22.60	17.58	15.07	12.56	10.00
210 miles.....	51.20	42.66	34.13	25.60	20.48	23.04	17.92	15.36	12.80	10.24
220 miles.....	52.18	43.48	34.78	26.09	20.87	23.48	18.26	15.65	13.05	10.43
230 miles.....	53.16	44.30	35.44	26.58	21.26	23.92	18.61	15.95	13.29	10.63
240 miles.....	54.14	45.11	36.09	27.07	21.66	24.36	18.95	16.24	13.54	10.83
250 miles.....	55.12	45.93	36.74	27.56	22.05	24.80	19.29	16.54	13.78	11.00
260 miles.....	56.10	46.75	37.40	28.05	22.40	25.25	19.64	16.83	14.03	11.22
270 miles.....	57.08	47.56	38.05	28.54	22.83	25.69	19.98	17.12	14.27	11.42
280 miles.....	58.06	48.38	38.70	29.03	23.22	26.13	20.32	17.41	14.52	11.62
290 miles.....	59.04	49.20	39.36	29.52	23.62	26.57	20.66	17.71	14.76	11.80

300 miles.....	60.02	50.01	40.01	30.01	24.01	27.01	21.01	18.01	15.01	12.00
310 miles.....	61.00	50.83	40.66	30.50	24.40	27.45	21.35	18.30	15.25	12.20
320 miles.....	61.98	51.65	41.32	30.99	24.79	27.89	21.69	18.59	15.50	12.40
330 miles.....	62.96	52.46	41.97	31.48	25.18	28.33	22.04	18.89	15.74	12.59
340 miles.....	63.94	53.28	42.62	31.97	25.58	28.77	22.37	19.18	15.99	12.79
350 miles.....	64.92	54.10	43.28	32.46	25.97	29.21	22.72	19.48	16.23	12.98
360 miles.....	65.90	54.91	43.93	32.95	26.36	29.66	23.07	19.78	16.48	13.18
370 miles.....	66.88	55.73	44.58	33.44	26.75	30.10	23.41	20.06	16.72	13.38
380 miles.....	67.86	56.55	45.24	33.93	27.14	30.54	23.75	20.36	16.97	13.57
390 miles.....	68.84	57.36	45.89	34.43	27.54	30.98	24.19	20.65	17.21	13.77
400 miles.....	69.82	58.18	46.54	34.91	27.93	31.32	24.44	20.95	17.46	13.96
420 miles.....	70.80	59.00	47.20	35.40	28.32	31.86	24.78	21.24	17.70	14.16
440 miles.....	71.78	59.81	47.85	35.89	28.71	32.39	25.12	21.53	17.94	14.36
460 miles.....	72.76	60.63	48.50	36.38	29.10	32.74	25.47	21.83	18.19	14.55
480 miles.....	73.74	61.45	49.15	36.87	29.50	33.18	25.81	22.12	18.44	14.75
500 miles.....	74.72	62.26	49.32	37.36	29.89	33.62	26.15	22.42	18.68	14.94

PAGE BOUND VERTICAL IN BOOK

APPENDIX D.

BEFORE THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA.

In the Matter of the Commodity Rates to Distributing Centers Hereinafter Named, on the Line of the Northern Pacific Railway.

This matter having come before the Commission, and the evidence therein having been taken and concluded on the 2nd day of May, 1907, the Commission finds that the following named places, all in the State of Minnesota, having heretofore enjoyed distributing rates, are entitled to be known as distributing centers or terminals, viz:

East Grand Forks,	Breckenridge,
Fergus Falls,	Detroit,
Brainerd,	St, Cloud,
Sauk Center,	Moorhead,
Crookston.	

And that the rates named in "Exhibit C," hereto annexed, are reasonable maximum rates in carload lots from the terminals of St. Paul, Minneapolis and Minnesota Transfer and Duluth to said distributing centers on the freight articles mentioned in said exhibit, and that the regulations and minimums marked upon said exhibit are reasonable minimums and regulations in regard to such rates.

It is therefore ordered, that the rates between St. Paul, Minneapolis and Minnesota Transfer and Duluth and said distributing points above named, over the Northern Pacific Railway, are hereby fixed

as in "Exhibit C"; and said Railway Company is hereby forbidden to charge any higher or greater rates than the rates above named on the commodities named in "Exhibit C."

This order shall take effect on the 3rd day of June, 1907.

By the Commission,

A. C. CLAUSEN,

Secretary.

Dated St. Paul, Minn., May 3rd, 1907.

"EXHIBIT C."

Referred to in the Commissioners' Order.

RAILROAD AND WAREHOUSE COMMISSION SCHEDULE OF REASONABLE CARLOAD COMMODITY RATES.

St. Paul, Minn., May 3rd, 1907.

COMMODITIES.

Cider and vinegar, straight or mixed C. L., minimum weight 30,000 pounds.

Pickles, Kraut, Cucumber, Tomato, Cauliflower and Onions, also Vinegar, in tin cans, boxed or crated, in glass or stone, boxed or in barrels, kegs, kits, pails or tubs; also Table Sauces, including Catsup, Horseradish, prepared, Mustard, prepared, Pepper Sauce and Salad Dressing, in glass, boxed; in tin cans, boxed or crated, or in bulk in barrels, straight or mixed C. L., minimum weight 30,000 pounds.

Condensed Milk and Evaporated Cream, in glass, boxed, in cans, jacketed, boxed or crated, or in barrels, straight or mixed C. L., minimum weight 30,000 pounds.

Fruits, Vegetables, Cove Oysters and Catsup, in tin cans, boxed or crated, or in glass or stone jars, boxed, straight or mixed C. L., minimum weight 30,000 pounds.

Paper — Building, Roof and Wrapping, in bundles, rolls, boxes or crates, also paper bags and bundles, straight or mixed C. L., minimum weight 30,000 pounds.

Sugar (not Maple), C. L., minimum weight 30,000 pounds.

Syrup, Glucose, Jelly, Molasses, Preserves and Fruit Butter, in wood, in tin cans, boxed or crated, or in glass or jugs boxed; C. L., minimum weight 30,000 pounds.

Coffee, green or roasted, in bags, barrels or drums, also in packages, tin cans or pails, crated or boxed, in straight or mixed C. L., minimum weight 24,000 pounds.

Rice, in bags or in packages, boxed; straight or mixed, C. L., minimum weight 30,000 pounds.

Beans, dry, in bags, C. L., minimum weight 30,000 pounds.

Canned Sardines, in tin cans, boxed or crated, C. L., minimum weight 30,000 pounds.

"EXHIBIT C."—Continued.

Referred to in Commissioners' Order.

REASONABLE MAXIMUM CARLOAD COMMODITY RATES OVER THE LINES OF THE NORTHERN PACIFIC RAILWAY COMPANY ON THE COMMODITIES NAMED IN THIS EXHIBIT FROM ST. PAUL, MINNEAPOLIS AND MINNESOTA TRANSFER.

To	Rates in Cents Per 100 Pounds.	From Duluth.
East Grand Forks	21.40	21.79
Crookston	20.62	
Thief River Falls.....	22.58	
Fergus Falls	15.52	
Breckenridge	17.48	
Moorhead	18.66	
Sauk Center	10.82	
St. Cloud	6.50	

APPENDIX E.

CHAPTER 232.

An Act Relating to Railroad Freight Rates in the State of Minnesota and Defining Certain Duties of the Railroad and Warehouse Commission.

Be it enacted by the Legislature of the State of Minnesota:

"Classification of Commodities. Section 1. For the purpose of this act the commodities hereinunder named are classified as follows: Wheat, flaxseed, broom corn seed, hemp seed, millet seed, popcorn, castor beans, Hungarian seed, buckwheat, buckwheat flour, potato flour, wheat flour, prepared flour and all uncooked grain or cereal products manufactured from wheat, shall constitute class eleven (11); corn, oats, rye, barley, alfalfa feed, alfalfa meal, bran, brewers' grits, brewers' meal, brewers' refuse (dry), chopped feed other than wheat chops, corn flour, cornmeal, cotton seed cake, cotton seed hulls, cotton seed meal, gluten feed, gluten meal, grain screenings, hominy feed, kafir corn, linseed cake, linseed meal, middlings, shorts, sorghum seed, speltz, wild mustard seed, oat groats, rolled oats, oat dust, oat hulls, oatmeal, rolled rye, rye flour, malt, pearl barley, and all uncooked grain or cereal products manufactured from corn, oats, or rye shall constitute class twelve (12); lumber, lath, shingles, sash, doors and blinds shall constitute class thirteen (13), sheep (when carried in double-decked cars), and cattle shall constitute class fourteen (14); sheep (when carried in single-decked cars) and hogs shall constitute class fifteen (15); hard coal shall constitute class sixteen (16); soft coal shall constitute class seventeen (17).

Maximum Rates. Section 2. The following are hereby established and declared to be the reasonable maximum rates to be charged by railroad companies as common carriers of property in the State of Minnesota for the transportation, in carload lots, of the commodities belonging to the classes named in section one (1) of this act, between stations in the State of Minnesota, for the distances named in the following schedule, to-wit:

Rate for Commodities in Classification No. 17, in Dollars and Cents Per Ton.	.44	.44	.51	.52	.54	.57	.58	.59	.61	.62
Rate for Commodities in Classification No. 16, in Dollars and Cents Per Ton.	.54	.62	.63	.65	.69	.70	.72	.74	.75	.77
Rate for Commodities in Classification No. 15, in Cents per 100 pounds.	4.9	5.5	6.3	6.8	7.6	8.3	9.	9.7	10.3	11.
Rate for Commodities in Classification No. 14, in Cents per 100 pounds.	4.4	5.	5.5	6.3	6.7	7.4	7.9	8.6	9.2	9.8
Rate for Commodities in Classification No. 13, in Cents per 100 pounds.	2.7	3.3	3.8	4.4	5.4	5.6	5.8	6.	6.3	6.5
Rate for Commodities in Classification No. 12, in Cents per 100 pounds.	2.7	2.8	3.4	3.8	4.	4.2	4.5	4.6	4.8	5.
Rate for Commodities in Classification No. 11, in Cents per 100 pounds.	2.7	3.3	3.8	4.4	4.6	4.8	5.	5.2	5.4	5.7
Distance in Miles.	5	10	15	20	25	30	35	40	45	50

55	5.9	5.1	6.8	10.	11.3	.81	.64
60	6.1	5.3	7.	10.2	11.5	.83	.65
65	6.3	5.5	7.4	10.5	11.8	.85	.69
70	6.5	5.8	7.5	10.7	12.	.87	.70
75	6.7	6.	7.7	10.9	12.3	.89	.72
80	7.	6.2	8.1	11.1	12.5	.93	.74
85	7.2	6.3	8.3	11.3	12.7	.95	.75
90	7.4	6.5	8.5	11.5	13.	.97	.77
95	7.6	6.7	8.7	11.8	13.3	.99	.80
100	7.8	7.	9.	12.	13.5	1.01	.82
105	7.9	7.	9.2	12.2	13.7	1.04	.83
110	8.1	7.	9.3	12.4	13.9	1.06	.84
115	8.2	7.2	9.4	12.6	14.3	1.07	.85
120	8.2	7.2	9.4	12.8	14.5	1.08	.86
125	8.3	7.3	9.5	13.	14.7	1.10	.87
130	8.4	7.4	9.6	13.3	14.9	1.11	.88
135	8.5	7.4	9.8	13.5	15.3	1.12	.92
140	8.5	7.5	9.8	13.7	15.5	1.16	.93
145	8.6	7.6	9.9	13.9	15.7	1.17	.94
150	8.7	7.6	10.	14.2	15.9	1.19	.95
155	8.8	7.7	10.1	14.4	16.2	1.20	.96
160	8.8	7.8	10.1	14.6	16.4	1.22	.98

PAGE BOUND VERTI

165	9.	7.9	10.4	14.8	16.7	1.24	1.00
170	9.	7.9	10.4	15.	16.9	1.29	1.01
175	9.1	8.1	10.6	15.3	17.2	1.31	1.05
180	9.1	8.1	10.6	15.5	17.4	1.33	1.07
185	9.3	8.2	10.7	15.7	17.6	1.35	1.09
190	9.4	8.3	10.8	15.9	17.9	1.37	1.10
195	9.5	8.3	10.9	16.1	18.2	1.42	1.12
200	9.6	8.4	11.	16.3	18.4	1.44	1.16
210	9.7	8.5	11.1	16.6	18.6	1.48	1.19
220	9.8	8.6	11.2	16.8	18.8	1.54	1.22
230	9.9	8.7	11.4	17.	19.1	1.58	1.28
240	10.	8.8	11.6	17.2	19.4	1.63	1.31
250	10.2	8.9	11.8	17.4	19.6	1.68	1.34
260	10.3	9.1	11.9	17.6	19.8	1.72	1.37
270	10.5	9.3	12.	17.9	20.2	1.78	1.42
280	10.6	9.4	12.2	18.1	20.4	1.82	1.46
290	10.8	9.5	12.4	18.3	20.6	1.87	1.49
300	10.9	9.6	12.5	18.5	20.8	1.92	1.54
310	11.	9.7	12.6	18.7	21.1	1.94	1.56
320	11.1	9.8	12.8	19.	21.4	1.96	1.57
330	11.2	9.9	12.9	19.2	21.6	1.99	1.59

PAGE BOUND VERTICAL IN BOOK

340	11.3	9.9	13.1	19.4	21.8	2.02	1.60
350	11.4	10.	13.2	19.6	22.1	2.04	1.63
360	11.5	10.1	13.3	19.8	22.3	2.06	1.66
370	11.7	10.2	13.4	20.	22.6	2.08	1.67
380	11.8	10.3	13.5	20.3	22.8	2.11	1.69
390	11.9	10.5	13.6	20.5	23.1	2.13	1.70
400	12.	10.6	13.7	20.7	23.3	2.16	1.72

Section 3. When the exact distance which a commodity is transported is not given in the foregoing schedule, the carrier may charge the rate specified in the said schedule for the next greater distance. In order to constitute a carload, within the meaning of this act, the weight of the commodity in any one car shall be at least as follows: Class eleven (11) and class twelve (12), twenty-four thousand (24,000) pounds; class thirteen (13), twenty thousand (20,000) pounds; class fourteen (14), nineteen thousand (19,000) pounds; class fifteen (15), fifteen thousand (15,000) pounds; class sixteen (16) and seventeen (17), thirty thousand (30,000) pounds.

Section 4. No Railroad Company, which is a common carrier of property within the State of Minnesota, shall charge, take or receive any greater sum for carrying within this state, between stations therein, any of the commodities named in this act than the respective amounts set forth and provided for in section two of this act for the respective distances therein named.

Section 5. This act shall not in any manner affect the power or authority of the Railroad and Warehouse Commission, except that no duty shall rest upon the Railroad and Warehouse Commission to enforce any rates specifically fixed by this or any other statute of this state. Whenever in a proceeding regularly pending before the Railroad and Warehouse Commission, it shall be made to appear to the satisfaction of said Commission that

the rates herein prescribed are unreasonable, it may by order fix higher or lower rates for the transportation of any of the commodities herein mentioned, over the line of any railroad in this state, and such rates when so fixed shall supersede the rates herein prescribed upon said line of railroad, and shall be enforced as prescribed by the law relating to such orders, and until such order shall have been made by said Railroad and Warehouse Commission the rates herein prescribed shall be the exclusive legal maximum rates for the transportation of the commodities herein enumerated between points within this state.

Section 6. Every railroad company transacting the business of a common carrier within this state shall adopt and publish and put into effect rates not exceeding the charges specified herein for the transportation by it, between stations upon its line of road in this state, of the commodities named in this act; and every officer, director, traffic manager or agent or employe of such railroad company, exercising any authority or being charged with any duty in establishing freight rates for such railroad company, shall cause the adoption, publication and use by said railroad company of rates not exceeding those specified in this act; and any officer, director or such agent or employe of any such railroad company who violates any of the provisions of this section, or who causes, or counsels, advises or assists any such railroad company to violate any of the provisions of this section, shall

be guilty of a misdemeanor, and may be prosecuted therefor in any county into which its railroad extends, and in which it has a station, and upon conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days.

Section 7. If at the time of the taking effect of this act any railroad is maintaining a rate between any two stations in this state that is less than the rate herein prescribed for the same distance, this act shall not be construed as authorizing the raising of such rate.

Section 8. This act shall take effect and be in force from and after June 1, 1907.

Approved April 18th, 1907.

By Chapter 136, Laws 1909, the first five sections of Chapter 232, Laws 1907, were re-enacted the changes in the statute as it existed when these suits were instituted by Ch. 136, Laws 1909, are found in the following sections of that act:

RAILROAD COMPANIES TO ADOPT, PUBLISH AND PUT INTO EFFECT, RATES. Section 6. Every railroad company transacting the business of a common carrier within this state shall adopt and publish and put into effect rates not exceeding the charges specified herein for the transportation by it between stations upon its line of road in this state of the commodities named in this act; and every officer, director, traffic manager or agent or employe of such railroad company, exercising any authority or being charged with any duty in establishing freight rates for such railroad company

shall cause the adoption, publication and use by such railroad company of rates not exceeding those specified in this act.

ACT NOT TO BE CONSTRUED AS RAISING RATES. Section 7. If, at the time of the taking effect of this act, any railroad is maintaining a rate between any two stations in this state, that is less than the rate herein prescribed for the same distance, this act shall not be construed as authorizing the raising of such rate.

TO OPERATE AS A CONTINUATION OF CHAPTER 232, GENERAL LAWS 1907. Section 8. This act is intended to operate as a continuation of Chapter 232 of the Laws of 1907, and not as a repeal thereof, except that the provisions of said Chapter 232 contained in section six thereof, prescribing penalties for the violation thereof, are hereby repealed.

Section 9. This act shall take effect and be in force from and after its passage.

Approved April 3, 1909.

APPENDIX F.

CHAPTER 97.

An Act Prescribing the Maximum Rate to be Charged for the Transportation of Passengers Upon Railroads Within the State of Minnesota, Providing for the Enforcement of the Same and Penalties for the Violation Thereof.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. MAXIMUM RATE. No railroad company owning, operating or using a line of railroad within, or partly within, the State of Minnesota, shall charge or collect more than two (2) cents per mile for carrying over its road on any trip wholly within the state any passenger of twelve (12) years of age or over, together with baggage not exceeding one hundred and fifty (150) pounds in weight, or more than one (1) cent per mile for any such passenger under twelve (12) years of age, together with baggage not exceeding seventy-five (75) pounds in weight.

SECTION 2. PENALTIES FOR VIOLATION. Any railroad company or any officer, agent or representative thereof, who shall violate any provision of this act shall be guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding five thousand (5,000) dollars, or by imprisonment in the state prison for a period not exceeding five (5) years, or by both such fine and imprisonment.

Section 3. This act shall take effect and be in force from and after the 1st day of May, 1907.